Supreme Court, U.S.
FILED

001462 MAR 20 2001

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No. : _____

In the

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, et al.,

Respondents,

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New York

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

Petitioner Adrienne Marsh Lefkowitz seeks to challenge the constitutionality of a New York Statute, Surrogate's Court Procedure Act ("SCPA") §506 and a hearing under which a private attorney was appointed (as a referee to hear and report) *sua sponte* by the probate judge overseeing petitioner's father's estate. The appointment of the referee to hear and report was made without consent, and indeed he served over petitioner's objection. Yet the legislative history of SCPA §506 indicates that consent to a reference is necessary. (49a) The referee conducted a (1994) hearing regarding petitioner's accounting as former preliminary executrix of her father's estate and three consolidated attorney fee proceedings (under SCPA §2110), which culminated in charges (with interest) of almost two million dollars against petitioner as well as significant damage to her professional reputation.

Petitioner argues that SCPA §506 and its application herein are unconstitutional and unconstitutional as applied as repugnant to the U.S. Constitution (V & XIV amendments) – in particular in violation of petitioner's due process and equal protection rights, and that the 1994 hearing by a referee deprived her of almost two million dollars and her reputation without due process or equal protection of law.

The Court of Appeals of the State of New York *sua sponte* dismissed petitioner's appeal as of right on the jurisdictional ground "that no substantial constitutional question is directly involved." *In re Marsh*, N.Y.2d (Dec. 21, 2000). (at 1a)[1] Previously, the Appellate Division did not

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1. References to the Appendix to this petition are denoted as "___a." References to the Appendix submitted to the New York Appellate Courts are denoted "A- ." That appendix includes the relevant hearing transcripts and exhibits.

"... find any defect in the referee's services." *In re Estate of Marsh*, 265 A.D.2d 253 (1st Dept. 1999). (See 4a.)

This motion raises numerous substantial federal questions that warrant a Writ of Certiorari:

1. Is the constitutionality of New York Surrogate's Court Procedure Act ("SCPA") §506 a substantial constitutional question that is directly involved in the appeal of orders and a decree based on a hearing conducted by a private attorney appointed as a referee under SCPA §506 without consent?

2. Is SCPA §506 unconstitutional?

3. Is SCPA §506 unconstitutional as applied?

4. Was petitioner denied her constitutional rights to due process of law in surcharging her almost two million dollars based upon a hearing conducted by a referee to hear and report appointed under SCPA §506 *sua sponte* by the probate court without consent and where the determination was made by the judge who had not had an opportunity to observe and weigh the credibility of the witnesses?

5. Where the referee sought and received payment from a respondent before issuing his report, engaged in at least 11 *ex parte* conferences with that respondent's counsel, never swore an oath of office and had an undisclosed out-of-court relationship with a party, and whose appointment did not comply with New York CPLR 4315, 4312(3), 4321(1), was petitioner denied a fair trial and her due process rights?

6. Was it a violation of the equal protection clause for the state of New York to have allowed the use of the referee without consent, and in fact over petitioner's objection?

7. Where the referee made material representations to petitioner, did he violate her due process rights? *Inter alia*: the referee stated on June 15, 1994 that petitioner had met her burden of proof on a key issue, cutting off her presentation of evidence, but then ruled against her, recommending a surcharge of over $1.6 million including interest.

8. Is it unconstitutional to impose referee fees, now approximately $300,000, without consent of the parties?

9. In permitting the court to proceed without subject matter jurisdiction over some issues were petitioner's due process rights violated?

10. Was it a violation of petitioner's due process (and First Amendment) rights to prohibit her court reporter from transcribing an unofficial transcript at petitioner's expense, after the mechanical transcribers had misidentified speakers and made otherwise seriously defective transcripts?

11. Was it a violation of petitioner's due process rights to order her to pay $250,000 (plus interest) to other beneficiaries' attorneys without a hearing on the issue or notice?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

Adrienne Marsh Lefkowitz — Petitioner
323 S. Doheny Drive Apt. 207
Los Angeles, CA 90048
the accounting party, nominated fiduciary,
only outright beneficiary
pro se

The Bank of New York as Executor of the — Respondent
Estate of Nicholas Marsh
123 Main Street
White Plains, NY 10602
the objectant to the Lefkowitz accounting
represented by:
McCarthy, Fingar, Donovan, Drazen & Smith
11 Martine Avenue
White Plains, NY 10606
and Executor of the Estate of Irene Marsh — Respondent
formerly trust beneficiary

Stuart Salles, Esq. — Respondent
267 Broadway
New York, NY 10007
former temporary administrator of the estate
pro se

Loretta Marsh Fine — Respondent
150 East 69th St.
New York, NY 10021
trust beneficiary
represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

Claudia Marsh Appelbaum — Respondent
The Bluff
West Summit Road
Tuxedo Park, NY 10987
trust beneficiary
represented by:
Greene & Zinner
202 Mamaroneck Ave.
White Plains, NY 10601

Greene & Zinner, P.C. — Respondent
202 Mamaroneck Ave.
White Plains, NY 10601
fee petitioner *pro se* (and counsel to
Claudia Marsh Appelbaum)

Schulte Roth& Zabel — Respondent
919 Third Avenue
New York, NY 10022
fee petitioner
represented by:
D'Amato & Lynch
70 Pine Street
New York, NY 10270

Shea & Gould
fee petitioner
(In bankruptcy by time of 1994 hearing,
did not appear at 1994 hearing or submit briefs.)

Julie Lefkowitz — Respondent
323 S. Doheny Drive #207
Los Angeles, CA 90048
trust beneficiary who did not appear

Lauren Fine
1151 N. Atlantic Blvd.
Ft. Lauderdale, FL 33304
trust beneficiary who did not appear

Respondent

Solicitor General, Dept. of Law
The Capital
Albany, NY 12224

CORPORATE DISCLOSURE STATEMENT
RE THE BANK OF NEW YORK

The Bank of New York is a subsidiary of The Bank of New York Co., Inc., a publicly traded company trading as BK, with headquarters at One Wall Street, New York, N.Y. 10286.

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CITATIONS TO REPORTS OF THE CASE/OPINIONS BELOW

The three opinions below are reproduced in the appendix annexed hereto.

In re Marsh --- N.Y.2d ---, --- N.E.2d ---- (N.Y. Dec. 21, 2000) (TABLE, NO. 1401 SSD 82) (TEXT NOT AVAILABLE ON WESTLAW). Appeal dismissed. See 1a.

In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759, 712 N.Y.S.2d 447 (N.Y. June 13, 2000) (TABLE, NO. 474). Leave to appeal denied. See 42a.

In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25, 1999 N.Y. Slip Op. 08841 (N.Y.A.D. 1 Dept., Oct. 26, 1999) (NO. 2148). Decree affirmed. See 3a.

Other Related References

In re Estate of Marsh, 173 A.D.2d 336, 575 N.Y.S.2d 284 (N.Y.A.D. 1 Dept., May 21, 1991) (NO. 43171, 43172)
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Matter of Marsh, 79 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651 (N.Y. Dec. 18, 1991) (TABLE NO. 1201)

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In re Estate of Marsh, 207 A.D.2d 749, 616 N.Y.S.2d 962 (N.Y.A.D. 1 Dept. Sep. 29, 1994) (NO. 52623)

STATEMENT OF JURISDICTION

Petitioner Adrienne Marsh Lefkowitz respectfully prays

that a writ of certiorari be issued to review the orders of the appellate courts of the State of New York, the constitutionality of SCPA §506 and its application, and whether the proceedings had herein met even minimal constitutional standards.

Because a trial by a private attorney (clandestinely prepaid by a party), appointed without consent, in lieu of a trial by a duly constituted court or jury, is so fundamentally abhorrent to the requisites of the U.S. Constitution, this is a matter of utmost federal importance.

It is a cornerstone of our system of jurisprudence and the rights of the citizens of this country that all citizens be afforded due process and equal protection regardless of wealth. Thus, "the wealthy"[2] have no lesser rights to a fair trial and "the wealthy" should not have to submit to a vastly more expensive yet defective legal process than do ordinary citizens. It is a violation of due process and equal protection of the laws to subject "the wealthy" to hearings by privately paid referees without consent and at great cost. In our system of jurisprudence access to a judge or jury is not to be denied on the basis of wealth or lack of wealth. There is no countervailing state interest to justify so egregious an incursion on a litigant's constitutional rights and in contravention of the purpose of SCPA §506 (See 49a).

Because the Internal Revenue Service is denied vast amounts of tax revenues when the cumulative effect of these estate administrative expenses[3] are considered, this petition

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2. Moreover, heirs to wealthy estates are not necessarily wealthy - particularly if distributions are withheld from them, as has occurred repeatedly herein. Petitioner proceeded *pro se* during the hearing and post-hearing submissions because her distribution from the estate was seized by her adversary, the executor.

3.Even were the estate tax to be entirely eliminated, which is unlikely, estate income taxes will continue and individual states may retain estate taxes.

goes well beyond petitioner's individual interests and the case at bar.

Jurisdiction is sought under 28 U.S.C.A. §1257(a).

28 U.S.C.A. §2403(b) may apply and the New York State Solicitor General is being served with this document.

This petition relates to a December 21, 2000 decision and order of the New York Court of Appeals (at 1a) which, *inter alia, sua sponte* dismissed petitioner's appeal as of right, *inter alia*, challenging the constitutionality of SCPA §506 on the ground that no substantial constitutional question is directly involved. This order from the state's highest court was a final order.

"The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the State Courts." *Street v. New York*, 394 U.S.576, 583 (1969).

The appeal to the Court of Appeals was taken from the Supreme Court of the State of New York, Appellate Division, First Department. The dates of service and filing of the Notice of Appeal to the New York Court of Appeals were October 6, 2000 and October 10, 2000, respectively.

On April 11, 2000 petitioner had moved for permission to appeal to the Court of Appeals. On September 5, 2000, notice of entry was served on petitioner by a Respondent by regular mail, of a June 13, 2000 order of the Court of Appeals denying that motion (at 42a).

Notice of entry of the lower court orders were:

Notice of entry was on November 4, 1999 of an October 26,1999 order (at 3a) of the Appellate Division which was mailed by a Respondent.

On November 24, 1999 petitioner served by regular mail a motion to the Appellate Division for reargument. On December 7, 1999 she served by regular mail a motion to the Appellate Division for leave to appeal to the Court of Appeals.

Notice of entry was sent by overnight delivery upon petitioner on March 16, 2000 of the Appellate Division's February 8, 2000 order denying the petitioner's motions(at 6a).

The matter commenced in New York County Surrogate's Court, which culminated in an April 23, 1998 decree (entered on April 27, 1998) (at 10a) regarding petitioner's accounting (filed in 1990) and three consolidated attorney fee proceedings. Notice of entry was served on April 29, 1998 by a respondent. The notice of appeal was served on May 26, 1998 by regular mail.

The appendix at pp. 52a *et seq.* describes how petitioner raised below and preserved the questions presented in this petition.

> "If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right ... as if it had been specifically referred to and the right directly refused."

Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887). Thus irrespective of whether the New York appellate courts expressly ruled on petitioner's federal claims, the judgment below necessarily reflects the federal questions.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS PETITION

The Appendix contains the text of:

U.S. CONSTITUTION at 44a
Amendments I, V, and XIV, §1
SCPA 506 at 46a

STATEMENT OF THE CASE

This case originated in the probate court of New York County where patronage appointments have frequently been

made. However, prior practice did not include appointment of private attorneys to act as referees without consent of the parties to conduct hearings. Petitioner was deprived of almost $2 million, a property right, on the basis of such a hearing. In addition, as a 30% beneficiary of the estate, she has been compelled to absorb a portion of the fees of approximately $300,000 (to date) to the referee. Petitioner has consistently and vigorously resisted the imposition of the patronage appointees on her father's estate over the past 12 years.[4]

Appellant was the nominated co-executrix of her parents' reciprocal wills, dated May 26, 1983. (A-3594) Nicholas Marsh, her father, died on March 15, 1988. The primary asset of Mr. Marsh's American Estate was a fifty per cent (50%) interest in a family close corporation, JMI,[5] which was founded in 1913 by Mr. Marsh's parents. The other fifty per cent (50%) of JMI was owned by the decedent's spouse, Irene Marsh. Until her resignation on January 31, 1990, petitioner served as the chief operating officer and as a director of JMI. Mrs. Marsh, the sole beneficiary of this estate at the time, was also a director of JMI. With Mr. Marsh's demise, Mrs. Marsh and petitioner were the two surviving directors. Before his death, Mr. Marsh set up two other corporations in 1987, FMI and NVM, which were wholly owned by him. Petitioner was the chief operating officer of FMI and NVM as well.

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4. Both the temporary administrator, Stuart Salles, and the referee were labor lawyers. Mr. Salles was a District Council 37 attorney. Their total fees to date are almost $500,000. The Referee had no expertise in estate law.

5."JMI" refers to Joseph Markovits, Inc., "FMI" refers to Floral Masquerade, Inc., and "NVM" refers to NVM Capital Corp. "BNY" refers to The Bank of New York. "TR" refers to the condensed version of the hearing transcripts. Petitioner's exhibits are referred to as AML Exhibit # ____. BNY exhibits are referred to as BNY Exhibit # ____. "MFDDS" refers to estate counsel McCarthy, Fingar, Donovan, Drazen & Smith.

Petitioner's corporate positions pre-existed her fiduciary role.

Preliminary Letters Testamentary in the Estate of Nicholas Marsh were issued to the petitioner on or about April 25, 1988. On or about December 20, 1988, McCarthy, Fingar, Donovan, Drazen & Smith ("MFDDS"), acting then as attorneys for Mrs. Marsh, served a motion seeking to remove petitioner as preliminary executrix and requesting appointment as preliminary executor of an independent individual or bank.[6]

In June of 1988, the new companies, FMI and NVM - which were wholly owned by the Estate - had received funds of $1.5 million from the Estate; FMI was funded with $500,000 and NVM with $1 million. This funding in 1988 was effected after the petitioner had sought advice from her estate attorneys Schulte, Roth & Zabel who opined by letters that such transfers were proper. (AML Exhibits #59 & 60)(A-4046, 4047)

In the spring of 1989, JMI, along with some of its affiliates, was appraised by Touche-Ross at a value of over $13 million (AML Exhibit #39) (A-3965 to 4020). In June of 1989, Stuart Salles, the Temporary Administrator who was charged with obtaining the appraisal and finding a buyer for the companies (and safeguarding the Estate assets), did not entertain an offer for JMI of $9 million because he considered it as too low. (TR: 12/28 pp. 34-35, 41-42) (A-2485, 2486, 2487) (A-4088 to 4090).

In 1989, JMI was experiencing liquidity problems while being offered for sale. In order to keep the business going in 1989 during this period of impending sale, loans of $1.25 million were made by FMI and NVM to JMI. (BNY #51, 64, 66

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6. By custom of BNY, who appoints as estate counsel the attorney who drafts a will by which BNY becomes appointed fiduciary, MFDDS (who drafted the 1983 wills) stood to become estate counsel to BNY were BNY to be appointed fiduciary in the Estate. (BNY was nominated as an alternate fiduciary in the will although decedent had had no dealings with BNY.)

and AML #99, 188, 189, at A-3714, 3722-3740, 3741-42, 4151, 4398, 4399). With regard to these 1989 loans to JMI from the Estate companies, the petitioner sought and obtained the approval of the successor estate counsel as well as the corporate counsel. (TR: 6/10 p. 91, 97, 212, 215 at A-946, 947, 976, 977). Mrs. Lefkowitz also informed her co-fiduciary Mr. Salles (AML #103 at A-4152) and her mother of the need to transfer funds into JMI and sought their approval with respect to this matter. Indeed, as early as May 1989 and certainly at a June 20, 1989 status conference, the Court, Mr. Salles, and the beneficiaries, including the decedent's widow Mrs. Marsh, were made aware that loans to JMI were needed. Judicial notice is sought of A-4492 to 4506, 4512-13.

On December 21, 1990, Mrs. Lefkowitz filed her verified petition for an accounting as former preliminary executrix.[7] (A-3509 et seq.). In 1991, BNY filed its

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7. At a status conference held by Surrogate Lambert on January 31, 1990, the petitioner had resigned as officer and director of all of the domestic corporations in which the decedent had an interest as a shareholder. Petitioner had first sought to resign in May 1989. (AML Exhibit #136 at A-4223). At the urging of the other parties she continued in office (BNY Exhibit #68 at A-3744).

On March 19, 1990, another status conference was scheduled before Surrogate Lambert. (AML Exhibits #197 and 199 not in evidence). At this conference, the Surrogate summarily suspended petitioner as the preliminary executrix although there was no SCPA 711 petition pending and Mr. Salles was already serving as co-fiduciary. The Surrogate again expanded Mr. Salles' powers and set a removal hearing for one week later and dispensed with discovery or a petition, citing the Estate's alleged urgent need for funds.

A removal hearing was commenced on March 26, 1990. The Surrogate's Court entered a written Order revoking appellant's preliminary letters. Petitioner appealed unsuccessfully to the Appellate Division, First Department (173 A.D.2d 336). Approximately four months after appellant's removal, on August 22, 1990, Mr. Salles resigned and preliminary letters testamentary were issued to BNY.

On December 18, 1990 BNY and MFDDS negotiated and arranged

objections. In July 1993, BNY filed its amended objections. (A-3610 et seq.). A lengthy accounting hearing took place intermittently from May 17, 1994 through January 3, 1995[8] before a Referee to hear and report, Professor David Rudenstine, appointed *sua sponte* by Surrogate Preminger. Mrs. Lefkowitz had objected to the reference. (See, e.g., A-3424 et seq. and TR: 5/17 p. 50 at A-573).

Written submissions by the parties were filed by May 4, 1995. Almost seven months later, on December 1, 1995,

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BNY's clandestine sale of JMI and its affiliates to a third-party interest (including inside management and Irving Posner, who had been witnesses against Mrs. Lefkowitz) for $2,100,000, a price substantially higher than the $1.25 million in loans made to JMI (*see* AML Exhibit #42 at A-4021 et seq. and A-4606 to 4624), but well below the value of the companies which had over $8 million in hard assets at the time. (See, e.g. AML Exhibit #133 at A-4209 et seq.) The sale was made without the approval of then Surrogate Lambert who had convened a settlement conference on December 18, 1990, one purpose of which was to reinstate petitioner as the fiduciary. (AML Exhibit #128 at A-4191). There is no doubt that any outstanding balances on JMI's loans from NVM and FMI were repayable.

On or about June 3, 1991, the petitioner cross-moved pursuant to CPLR 5015, on grounds of newly-discovered evidence and fraud, for an order, *inter alia*, vacating the March 20, 1990 and April 19, 1990 Orders of the Surrogate's Court suspending and removing her, respectively. On December 4, 1992, the Surrogate's Court, by Hon. Eve Preminger, issued an Order denying Mrs. Lefkowitz's cross-motion. This order was appealed to the Appellate Division, First Department. On March 31, 1994, the Appellate Division issued a Decision and Order affirming the Surrogate's Order. (202 A.D.2d 367)

It is noteworthy that one of the grounds cited by the First Department in affirming her removal was Mrs. Lefkowitz's refusal to agree to seek additional loans to JMI in March, 1990, a time when JMI was (according to BNY) in worse condition than in 1989, when appellant made the loans for which petitioner was surcharged.

8. Three attorney fee proceedings had been consolidated with this accounting. The relevant hearings were held on May 11, 1994 through May 13, 1994.

Referee Rudenstine issued his belated report. (A-41 et seq.). *Inter alia*, his Report found: that petitioner should be surcharged $1,214,000 (plus interest) for loans she made to JMI in 1989 from NVM and FMI as a pre-existing president (Objections #27 and #28). He made this recommendation despite the fact that: a) tax returns filed by BNY and other "admissions" showed the loans were repaid at least in part; b) petitioner proved the loans were or could have been repaid, including evidence of over one million dollars in cash available at the debtor company; c) the Referee (and later the Surrogate) ignored the stipulations of the parties; d) the loans could have been fully repaid from the proceeds of a JMI sale in 1990 if they had not already been repaid; e) BNY never established a loss; indeed BNY never even established the loans had not been repaid; f) JMI's appraised value was over $13,300,00 in the relevant period (AML Exhibit #39 at A-3965 et seq.); g) Stuart Salles considered offers to purchase JMI of $9,000,000 as too low in June 1989; h) the $1.25 million loans preserved JMI for sale at over $2.1 million (of which this estate received 81.11%) and avoided a crash liquidation; i) Objectant BNY failed to produce the 1990 corporate records, including bank accounts, for NVM Capital. (BNY had control over the companies in 1990.) Yet the Referee surcharged petitioner for the $1 million loan NVM Capital had made in 1989 to JMI, as well as the FMI funds.

The Report was further tainted by other egregious errors of the Referee. The Referee acknowledged the unreliability of BNY Exhibit #39, the heart of BNY's case, and he claimed he did not rely on it. (p. 100 at A-142) (See footnote 12, *infra*.) The Referee also acknowledged that the providence of petitioner's actions should be judged by conditions at the time she acted. (p. 87 at A-129) However, the Referee then relied on BNY experts, particularly Mr.

Mallarkey (e.g. A-149 to 150), who relied not only on BNY Exhibit #39 but also on AML Exhibit #133, the 1990-1991 JMI financial statements, reflecting JMI's condition long after the mid-1989 loans. (TR: 12/9 p. 23 at A-2060)

The Surrogate denied petitioner's motion to vacate the Referee's appointment and for her own recusal (A-3155 to 3166) despite, *inter alia*, the following facts:

1) the Referee had received over $100,000 from BNY five months before issuing his Report (A-3229); (A-2954-55);

2) the Referee had at least 11 *ex-parte* phone conferences with BNY's counsel (A-3183 to 3196);

3) the Referee had an undisclosed out-of-court professional relationship with Stephen Schulte of Schulte Roth & Zabel (A-3239-42), a party and adversary of petitioner; and

4) the Referee apparently never swore an oath.

In July 1997 the Surrogate confirmed the Referee's Report on the surcharges other than reducing the Hong Kong tax penalty surcharge by 50% (approximately $13,000), without any further hearing. (A-29)

Thereafter motions to reconsider were made. In February 1998 the Surrogate denied petitioner's motion to reconsider but awarded $250,000 to the law firms (for other beneficiaries) to be paid from petitioner's interest in the estate (A-40) although the relevant petitions (A-2632, 2717) and hearings had addressed payment from the estate. (A-188-542).

A decree was signed in April 1998. (at 10a) The New York Appellate Division found no fault with the Referee's service. (at 3a) The New York Court of Appeals would not review the case on the merits. (at 1a)

The issues presented by this petition were expressly raised in the courts below. See 52a *et seq*.

ARGUMENT WHY WRIT SHOULD BE ALLOWED

The constitutionality of SCPA §506 and its application is a matter of public importance that reaches beyond the personal interest of petitioner. The decisions of the New York Appellate Courts "decided an important question of federal law that has not been, but should be, settled by this Court ..." Sup. Ct. R. 10(c). The constitutionality of any state statute is of importance. However, billions of dollars pass through the probate courts of New York. New York's statutory scheme for probate courts has deferred to the discretion of the Surrogate judges to an enormous extent – e.g., SCPA 719 which dispenses with process and discovery in removing fiduciaries,[9] and SCPA 711, which does *not* require removal on the enumerated grounds, and SCPA 2110, which gives the Surrogates control over beneficiaries' estate interests. However, prior usage of SCPA §506 had been (upon *consent*) to appoint Judicial Hearing Officers ("JHO's") or staff court attorneys under SCPA §506, which imposed no costs on the parties, and did not put the referee in the effective position of being an employee of a party. The legislative history of SCPA §506 indicates consent is necessary for the references. (See 49a)

Because a trial by a private attorney (clandestinely prepaid by a party) without consent, in lieu of a trial by a duly constituted court or jury, is so fundamentally abhorrent to the due process and equal protection requisites of the U.S. Constitution, this is a matter of utmost federal importance.

It is also fundamental to our system of jurisprudence and the rights of the citizens of this country that all citizens be afforded due process and equal protection regardless of wealth. Thus, "the wealthy" have no lesser rights to a fair trial and "the

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9. The petitioner was removed pursuant to SCPA §719.

wealthy" should not have to submit to a significantly more expensive yet defective legal process than do ordinary citizens. It is a violation of due process and equal protection of the laws to subject "the wealthy" to hearings by privately paid referees without consent and at great cost. In our system of jurisprudence access to a judge or jury is not to be denied on the basis of wealth or lack of wealth. There is no countervailing state interest to justify so egregious an incursion on a litigant's constitutional rights in contravention of the purpose of the statute (49a).

Because the Internal Revenue Service is denied vast amounts of tax revenues when the cumulative effect of these estate administrative expenses[10] are considered, this petition goes well beyond petitioner's individual interests and the case at bar.

This is a case that this Court should undoubtedly hear.

In enacting SCPA §506 the legislature made clear in its legislative history that privately paid attorneys were not to be appointed without consent. NY CLS SCPA §506 notes. (at 49a-50a) Indeed, in this estate, a JHO had previously served in 1990 in a minor matter at no cost to the parties and with consent. The court has since 1994 imposed approximately $300,000 in referee fees [so far] in this estate, without the consent of the parties. This is unconstitutional as violative of the due process rights conferred by the Fifth and Fourteenth Amendments to the U.S. Constitution. Moreover, the imposition of the Referee resulted in other additional costs and burdens of litigation and drastically prolonged the proceeding.

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10. Even were the estate tax to be entirely eliminated, which is unlikely, estate income taxes will continue and individual states may retain estate taxes. Moreover, any phase out of estate taxes would leave the taxes extant to some degree for years.

Furthermore, the conduct of the proceedings which culminated in surcharges with interest of almost $2,000,000 without proof of any loss to the estate, was inherently lacking in due process. The content of the underlying decision (at 28a *et seq.*) has irreparably damaged petitioner's professional and personal reputation and affects her professional prospects. Cf. *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971) at 404 U.S. 197. Moreover, the right to a fair trial is a fundamental due process right unlike appellate rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed. 2d 473 (1996) at 519 U.S. 114.

New York law has not allowed privately paid referees to be imposed on litigants without consent in its general courts. In targeting probate litigants for lesser rights (in contravention of SCPA 506's legislative history), the New York courts had denied petitioner her equal protection rights. See, e.g., *Ploski v. Riverwoods Owners Corp.*, 255 A.D.2d 24 (2d Dept. 1999), CPLR 3104. Nor do probate judges in other counties impose referees to try accounting hearings without consent.

As applied, SCPA 506 did not meet the lowest level of presumable due process or equal protection scrutiny. The selection of petitioner's litigation as one to be adjudicated by a private attorney was not related to a legitimate state interest. Patronage appointments are not a legitimate state interest. Moreover, the Referee was imposed on the basis of the wealth of the estate and not on the basis of the complexity of the matter.

If the orders below are allowed to stand, they will allow New York to impose private referees who were unsworn, prepaid by an adversary, with extensive conflicts of interest, to serve in lieu of judges in matters involving millions of dollars. No citizen should be deprived of millions of dollars in a

proceeding which does not provide the minimal standards of due process and a fair hearing. Where the referee (and courts) even ignored the parties' stipulations[11] there certainly was not a scintilla of due process. Nor should a litigant lose her reputation and professional prospects without a fair trial.

The use of private attorneys results in determinations by the probate judge who never heard the witnesses and had no basis to determine the credibility of witnesses, and leaves the judge unfamiliar with the hearing.

The factual confusion in the Surrogate's July 1997 decision (28a to 38a) is indicative that petitioner was denied a fair trial. The Referee was not the decision maker. The Surrogate was. Yet the Surrogate was clearly unfamiliar with the facts and ignored key stipulations. Because the Surrogate's July 1997 decision reflects confusion as to the underlying facts, it is patently apparent that the failure of the Court to conduct the hearing herself materially affected the outcome and petitioner's rights. For instance, the Surrogate mistakenly believed MFDDS had acted as BNY's counsel at the 1990 removal hearing. The Surrogate also was unaware that there had been no witnesses or evidence of mismanagement of the companies by petitioner. *Inter alia*, the Surrogate also misstated the end-date of the accounting. A Court that does not know the rest date of the accounting should not determine damages. The Surrogate was confused about the claims related

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11. BNY had stipulated that FMI had a certificate of deposit valued at $275,000 on the rest date of the accounting (January 31, 1990) (TR: 6/9/94 p. 150 at A-920), and that FMI had $37,377.57 in the bank (TR: 6/15/94 pp. 146, 146 at A-1133). BNY had itself valued FMI's inventory at $262,000 as of December 31, 1989 (A-3681, 3761 *et seq.*), one month earlier; with few sales shipped in January. The balance on the loan to JMI also had some value. The Referee chose to ignore the stipulations and value of FMI's and JMI's inventory, cash, accounts receivable, fleet of autos, machinery and equipment.

to the fees of Rosen, Szegda, Preminger and Bloom. The Surrogate also mistakenly attributed the drop in JMI's performance after 1984 to petitioner by erroneously assuming decedent's stroke and petitioner's control over JMI occurred in 1985. This indicates confusion as to proximate cause of the Surrogate's other presumptions of loss. While the Referee claimed that he did not consider BNY's key exhibit, BNY Exhibit #39, in his report (p. 100 at A-142), and while he acknowledged its questionable reliability, BNY's experts Mallarkey and Roloff *did* rely on BNY Exhibit #39. Since the Referee in turn adopted the BNY experts' opinions, which opinions were based on BNY Exhibit #39, it cannot be disputed that the improper admission of BNY Exhibit #39 fatally tainted the hearing. Yet the Surrogate ignored the issue of BNY Exhibit #39.[12] Indeed, the Surrogate stated there was an "uncontroverted loss" (37a) despite 8 years of controversy over the issue.

In *United States v. Kras*, 409 U.S.434, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973) this Court held that there is a due process right of access to the courts when fundamental rights are at issue and a State exclusively controls adjusting the legal relationships involved. 409 U.S. at 445. Here, the Surrogate's Court and State have exclusive control over an executor's accounting.

12.BNY counsel Streng claimed the handwritten unsigned BNY #39 was prepared by the JMI staff (TR: 6/20 p. 150 at A-1311), in early 1990 (TR: 6/20 p. 151 at A-1312) under the supervision of a CPA firm (TR: 6/20 p. 91 at A-1297). In fact, it was prepared in 1991 or 1992 by a per-diem bookkeeper (TR: 12/2 p. 17 at A-1974).As a purported 1989 JMI financial statement it was prepared too late to have been admitted as a business record, as it was. Cf. CPLR 4518. Moreover, other witnesses were examined on BNY #39. Indeed the Surrogate did rely directly on BNY Exhibit 39. The Surrogate stated there was a $6 million loss at JMI(A-34) during petitioner's tenure. The only evidence on which so large a loss could be based was BNY Exhibit #39.

Petitioner has standing to challenge SCPA §506 and its application. Indeed, under the standard used by the New York Court of Appeals, no litigant would ever be able to challenge SCPA §506.

I. CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE REFEREE'S SERVING, AND IN THE HEARING

The constitutional questions presented for review are primarily violations of the Fifth and Fourteenth (§1) Amendments. It is clear the petitioner was denied her constitutional right to a fair hearing and her property, reputation and professional standing were taken from her without due process or equal protection of law.

The due process requirements of the Fifth and Fourteenth Amendments apply to state laws. Where state law is inconsistent with federally guaranteed rights the federal rights are controlling. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S.422, 432, 102 S.Ct. 1148 (1982); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982).

The New York Appellate Division was the last court to review this matter on the merits. That Court did not "find any defect in the referee's services." (4a) It did not address the constitutional issues of a hearing by a referee to hear and report (appointed over petitioner's objection) with decisions made by a judge who did not have a basis to judge the credibility of the witnesses or familiarity with the facts.

In denying petitioner access to a duly constituted judge of the court who could see the witnesses to appraise their credibility petitioner has been denied a constitutional right. It is interesting to note that Surrogate Preminger, who imposed the referee *sua sponte*, has expressed a negative view of hearings by referees. See, e.g., discussion in *Matter of Duke*, 87 NY2d 465, 470, 640 NYS 2d 446, 663 NE2d 602 (1996).

In discussing references, Professor Seigel, a leading scholar on New York practice, states:

> "... the absence of consent is in any event an element to be considered by the court in deciding whether to refer the matter. Other cases indicate that the reference to report is restricted to only that which the parties consent to. *A constitutional argument can be urged against a reference to report made over a party's objection: it can be urged that the party has a right to have the case tried before a duly constituted judge of the court, and that this requirement is not met merely by having the judge review the referee's findings.*

(Emphasis added, footnotes and citations omitted.) Siegel, D., *New York Practice*, 2d Ed. §379, p. 573 and 3d Ed. §379, p. 614.[13]

It has long been the law in New York that a referee could not seek payment until he had filed his report. However, Referee Rudenstine was paid $108,358.50 by BNY five months before he issued his Report. (A-2954-55) (on July 14, 1995). It is well-settled law that a referee has no right to his fees until his duties are completed and his report delivered or filed. *Matter of Robinson*, 187 A.D. 799, 176 N.Y.S. 273, 275 (1st Dept. 1910); *Hebard v. City of New York*, 137 A.D. 752, 122 N.Y.S. 628 (1st Dept. 1910), *Voron v. Chait*, 101 Misc. 366, 167 N.Y.S. 657 (Sup.Ct. N.Y.Co. 1917), aff'd, 183 A.D. 925, 169 N.Y.S. 1117 (1st Dept. 1918); *Ament v. Schubert Piano Co.*, 172 A.D. 423, 158 N.Y.S. 532 (1st Dept. 1916), *Nat'l Bank of North America v. New Paltz Growers, Inc.*, 89 A.D. 2d 647, 453 N.Y.S.2d 124 (3rd Dept. 1982).

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13. This very quotation was cited, e.g., in the Memorandum of Law to the Surrogate dated September 6, 1996 at pp. 15-16.

Indeed, *Robinson, supra,* holds that the payment and acceptance of fees before termination of the reference is sufficient grounds for the referee's *removal,* even absent any showing of prejudice or favoritism toward the party making the payment. Yet the New York Courts ignored that important body of law.

Moreover, multiple misrepresentations by the Referee denied petitioner due process and a fair trial because they affected the findings of fact. *Inter alia,* a) on June 15, 1994 the Referee made a ruling that "Ms. Lefkowitz has presented adequate evidence with regard to the valuations of Floral Masquerade and NVM Capital as of January 31, 1990 to shift the burden to the Bank ...." (TR: 6/15/94 p. 216 at A-1151). This ruling disrupted petitioner from calling witnesses and introducing additional evidence; b) That petitioner should not contest the Greene testimony of benefit to the company until later (A-508). This opportunity was never given; c) That only Greene & Zinner and Shea & Gould fees related to the 1990 removal trial would be considered (TR: 5/12/94 pp. 24 et seq. at A-477 to A-480); d) Assuring petitioner at a pre-hearing conference that she could have a live court reporter transcribe the hearing at her expense (TR: 5/13 p. 8 at A-550). Early in the hearing the Referee ruled there could be no transcription by the live reporter, even if each page were stamped "not official copy" and would not be used in court without permission (TR: 5/17 p. 34 at A-569); and e) The Referee never permitted petitioner to value JMI as of January 31, 1990, the rest day of her accounting. (TR: 5/25/94 pp. 240-44 at A-703-04 and A-4742.)[14]

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14. Petitioner raised the issue of the Referee's misrepresentations repeatedly, e.g., pp. 10-11 of her March 26, 1996 affidavit in her motion to the Surrogate to reject in part the Referee's Report.

The ruling on June 15, 1994 cut petitioner off from calling witnesses or introducing more evidence. Nor was she later permitted to introduce more valuation evidence. Along with the Referee's ruling that petitioner could not value JMI as of January 31, 1990, this crippled her case. The surcharge on the JMI loans represented what was not allocated to the loans by BNY from the December 18, 1990 JMI sale proceeds. It is not controverted that JMI fell in value in 1990. In particular: 1) The spring 1989 appraisal by Touche-Ross was over $13 million (A-3965 to 4020);2) The December 1989 offer was for $6.8 million (AML Exhibit #75 at A-4091) (shortly before January 31, 1990); 3) The June 1990 offer was for about $4.8 million (AML Exhibit #76 at A-4093; TR:6/13 p. 35 at A-993); but 4) the December 1990 sale was for only $2.1 million (with 5% interests given to BNY-allied witnesses) (AML Exhibit #42 at A-4020 *et seq*).

As to (d), it is clear that, as petitioner had warned the Referee, the transcripts of pre-trial conferences from the mechanical recording device were not accurate and even misidentified the speaker (A-2569 to 2631). In fact New York Judiciary Law §290a limits mechanical transcription to cases with two or fewer parties. After the hearing it was too late for petitioner to recognize all errors in identification of speakers - only where it was clear from the context would it be noticeable. Nevertheless, the mechanical transcriber misidentified speakers, see e.g., A-2610, 2616. It seems apparent that in a situation involving 3 law firm fee petitioners and at least 4 other parties, mechanical transcription should not have been used. Thus to have prohibited petitioner from having a live court stenographer, at her own expense (TR:5/17, p. 34 at A-569) in contravention of the Referee's past representations (TR:5/13, p. 8 at A-550), clearly denied petitioner a fair trial. The trial was supposedly open to the

public. Thus the exclusion of the live transcriber raises First Amendment issues as well.

This Court has found that "the Due Process Clause grants the aggrieved party the opportunity to present the case and have its merits fairly judged." *Logan, supra*, 455 U.S. at 433.

Petitioner's rights to almost $2,000,000 in damages assessed against her and her reputation clearly are important interests. The decree below is a final deprivation. This was done without petitioner obtaining meaningful judicial review.

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) involved the right to access to courts. In particular, the state's imposition on indigents seeking divorce of substantial fees was held to be a denial of due process. This Court held that where interests of basic importance were at issue, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. at 37. In *Logan, supra*, 455 U.S. at 429-430 this Court interpreted *Boddie*: "The Fourteenth Amendment's Due Process Clause has been interpreted as preventing States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the 'equivalent of denying them an opportunity to be heard upon their claimed rights.'" Clearly the Surrogate presiding over a trial is the established adjudicatory procedure, one that was denied to petitioner.

Moreover, in *Boddie, supra*, this Court also stated:
"... Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." 401 U.S. at 379.

Petitioner was required to file her accounting by the Court. Thus full and fair access to customary procedures was a due process right. In the litigation over her accounting, once objections were filed thereto by BNY, petitioner in essence became "a defendant". Thus the due process principles that delimit the rights of defendants apply.

The Courts also erred on the issue of jurisdiction of the Surrogate's court over actions petitioner took as a pre-existing corporate officer (of companies no longer owned by the estate at the time the objections were filed). These were claims by corporations against a former officer, i.e. disputes between "living entities". A case on point is *Matter of Liebowitz*, 34 A.D.2d 750, 310 N.Y.S.2d 529(1st Dept. 1970).See also *Matter of Browning*, 258 A.D. 621, 17 N.Y.S.2d 557(1st Dept. 1940).

The New York Courts also ignored the principle of judicial estoppel. In 1994 the First Department cited petitioner's refusal to agree to seek a million dollar loan to JMI in March 1990 as grounds for her removal. In *this* decision the First Department upheld the improvidence of loans to JMI made in 1989 when JMI was far more financially sound.[15] The doctrine of judicial estoppel or estoppel against inconsistent legal positions holds that a party should be barred from advocating contrary positions in different legal proceedings. *See, e.g., Perkins v. Perkins*, 226 A.D.2d 610, 641 N.Y.S.2d 396 (2d Dept. 1996); *Moore v. County of Clinton*, 219 A.D.2d 131, 640 N.Y.S.2d 927 (3d Dept. 1996), *lv. denied*, 89 N.Y.2d 851 (1996); *Horn v. Bennett*, 253 A.D. 630, 3 N.Y.S.2d 525 (2d Dept. 1938), *app. denied*, 278 N.Y. 736, 16 N.E.2d 804 (1938).

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15. BNY in 1991 and 1994 complained of petitioner's refusal to sign a letter seeking a loan of $1 million for JMI in 1990. Yet in this accounting BNY complains that loans of $1.25 million made in 1989 to JMI (when JMI was in sounder financial condition in 1989) were improvident.

II. AWARD OF $250,000 FROM PETITIONER'S SHARE OF THE ESTATE FOR OTHER PARTIES' ATTORNEY FEES, WITHOUT NOTICE OR A HEARING

The SCPA §2110 fee proceedings of Greene & Zinner and Shea & Gould had sought recovery from the estate (A-2632 and A-2717). There was no notice to petitioner or hearing on the issue of recovery from her estate interest. The 1994 hearing was based on the issue of the entitlement to recovery *from the estate* by a beneficiary for attorneys' fees. Thus petitioner was denied notice and a hearing in derogation of her due process rights. U.S.C.A. Const. Amend.14 & Amend. 5. Moreover, under New York case law petitioner was entitled to a hearing before any legal costs were charged against her. In *Estate of Campbell*, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3d Dept. 1988) the Court held that the fiduciary "must be afforded an opportunity, on remittal, to defend himself" on the question of payment from the fiduciary of the objectants' legal expenses.

Initially, based on the 1994 hearing, both the Referee and the Surrogate had denied the applications of Greene & Zinner and Shea & Gould (A-29 and A-165 to 176). They were granted only on motions to reconsider (A-40).

Petitioner's $250,000 estate interest (plus interest) in her father's estate was a property right to which she was entitled to due process of law before that property was taken from her. The relevant petitions sought recovery from the estate, not petitioner. The 1994 hearing was tried on the basis of recovery from the estate and was defended by the estate counsel. Only after recovery from the estate was denied after the hearing did the beneficiaries' counsel seek recovery from petitioner's interest in the estate. No hearing was held on the matter.

In *Mullane v. Central Hanover Bank & Trust Co.*,339

U.S.306,313,70 S.Ct. 652,94L.Ed.865(1950), this Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

In fact the December 1, 1995 Referee's Report had found that the work by Greene & Zinner for JMI was as volunteers (A-173), a lack of retainer by the temporary administrator and duplication (A-173), and questioned the reasonableness of the amounts sought (A-174 in fn. 276). Moreover, it was an error to compensate Greene & Zinner for services to JMI, a company owned only 50% by the estate, when there was no evidence of retainer by JMI. Greene & Zinner should have sought recovery from JMI. Surely it is error to charge petitioner for volunteer services to JMI.

Nor did the respondents cite an apposite case where beneficiaries recovered their counsel fees from the fiduciary. The fee respondents conceded this was a matter of first impression. There are cases of surcharging the fiduciary *for the estate's expenses* for exposing an errant fiduciary's misconduct. However, there is no case law for charging the fiduciary for a beneficiary's legal expenses in a removal where there is another fiduciary at the time, the temporary administrator (Mr. Salles), whose interests are joined with the beneficiaries and estate.

Nevertheless, the New York Appellate Division stated:

> "The challenged awards of attorney fees were proper exercises of the Surrogate's 'unquestionably broad discretion' to fix such fees (see *Matter of Urbach*, 252 A.D.2d 318, 322). The services for which the fees were

awarded were related to exposing petitioner's misconduct (*see, Matter of Birnbaum v. Birnbaum*, 157. A.D.2d 177, 191)...."

Matter of Birnbaum v. Birnbaum, supra is inapposite. *Birnbaum* involved recovery *by an estate* of its counsel fees.[16]

Indeed, a beneficiary's right to recoupment of attorney fees had been circumscribed by numerous cases to a requirement that the beneficiary's attorney's efforts resulted in a substantial enhancement of the size of the estate and every beneficiary's interest in the estate. *In re Baxter*, 196 A.D.2d 186, 609 N.Y.S.2d 992 (4th Dept. 1994), *mot. for rearg. or lv. to app. denied*, 1994 N.Y. App. Div. LEXIS 7935 (July 1, 1994); *In re Estate of Scarsella*, 195 A.D.2d 513, 600 N.Y.S.2d 256 (2d Dept. 1993); *Estate of Bellinger*, 55 A.D.2d 448, 451 (4th Dept. 1977); *Matter of Wiltshire*, 4 A.D.2d 981, 167 N.Y.S.2d 852 (3d Dept. 1957);Matter of Lounsberry, 226 A.D. 291, 234 N.Y.S. 680 (4th Dept. 1929). See A-169. These beneficiaries and their attorneys not only did not enhance the estate but reduced it. Thus the beneficiaries were not entitled to recovery from the estate. In fact Mr. Ball conceded that Shea & Gould's efforts had not augmented the estate (TR: 5/11/94 p. 221 at A-408). See also the 1990 JMI financial statement reflecting losses exceeding $4 million after the takeover by Greene & Zinner and Shea & Gould's clients. (A-4209 *et seq.*).

Where the beneficiaries *had to* act because the fiduciary's actions were adverse to the estate and beneficiaries, there can be a recovery. *Matter of Graves*, 197 Misc. 638, 639 (Surr. Monroe Co. 1950); see also *Matter of Smith*, 167 Misc. 95, 98 (N.Y.Sur. 1938). However, as the Referee had found in 1995, here the estate had a pre-existing second fiduciary, the

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[16] Moreover, *Birnbaum* involved fraud.

temporary administrator, Stuart Salles, who had retained Paul, Weiss (A-173). Moreover, Greene & Zinner's and Shea & Gould's clients were mere remaindermen prior to Irene Marsh's death. At the time at issue the only beneficiary was Irene Marsh, who was represented by her own counsel, MFDDS, as well as by a *guardian ad litem*, to safeguard her and the estate's interests. See also *Matter of Hidden*, 243 N.Y.499, 154 N.E. 538 (1926) where the Court of Appeals refused payment to a party (the incompetent's spouse) from the errant fiduciary.

While the Appellate Division cited *Urbach, supra*, for the proposition that a Surrogate has "unquestionably broad discretion" to fix attorney fees, *Urbach* in fact reversed a Surrogate who had charged a beneficiary's estate interest for the attorney fees of the estate. Many appellate decisions indicate that Surrogates have been reversed when, *inter alia*, they have attempted to charge estate counsel fees to a beneficiary (or their interest in the estate) or to allow payment of a beneficiary's counsel fees from an estate. *See, e.g., Matter of Dillon*, 28 N.Y.2d 597, 268 N.E.2d 646, 319 N.Y.S.2d 850 (1971); *Matter of Urbach*, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3d Dept. 1999); *Matter of Lounsberry*, 226 A.D. 291, 234 N.Y.S. 680 (4th Dept. 1929); *In re Baxter*, 196 A.D.2d 186, 609 N.Y.S.2d 992 (4th Dept. 1994), *mot. for rearg. or lv. to app. denied*, 1994 WL 370943, *leave to appeal denied*, 84 N.Y.2d 808 (1994); and *Matter of Wilhelm*, 88 A.D.2d 6, 452 N.Y.S.2d 957 (4th Dept. 1982). It should be noted that *Dillon* is a Court of Appeals decision which did *not* permit charging the beneficiary's estate interest.

For a beneficiary to recover for his counsel fees the law of New York had required augmentation of estate assets or acting where the fiduciary's interests were adverse to the estate's. At the time of the removal, petitioner was suspended and Stuart Salles was the sole fiduciary. His interests were not

adverse to the estate's. Thus neither criterion was applicable. Where the beneficiary's attorney's services merely tend to prevent a decrease of the estate, there is no entitlement to compensation. *Estate of Heilbronner*, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr.Ct. N.Y.Co. 1963).

The New York courts created new law without notice and a hearing on the issue. The State of New York should not deprive a citizen of her property without due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Adrienne Marsh Lefkowitz
323 South Doheny Drive, #207
Los Angeles, CA 90048
(917) 414-9400
(310) 247-9647
Petitioner *Pro Se*

March 19, 2001

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of December 2000

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 1401 SSD 82
In the Matter of Nicholas Marsh, etc.,

Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

In the Matter of Shea & Gould, etc.,

In the Matter of Greene & Zinner, P.C., etc.

Adrienne Marsh Lefkowitz,

Appellant,

Claudia M. Appelbaum, et al.

Respondents,

The Bank of New York, etc.,

Objectant-Respondent,

Schulte, Roth & Zabel, et al.,

Fee Petitioners-Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as taken from the Appellate Division order denying appellant's motion to enlarge the record, and the Appellate Division order denying appellant's motions, for reargument and leave to appeal to this Court, be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that such orders do not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

S/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Sullivan, J.P., Tom, Rubin, Saxe, Buckley, JJ.

2148 In re Estate of Nicholas Marsh, etc.,
Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

Application of Shea & Gould, etc.,

Application of Greene & Zinner, P.C., etc.

Adrienne Marsh Lefkowitz,
Petitioner-Appellant,

Pro Se

Claudia M. Appelbaum, et al.,
Respondents-Respondents.

Arthur M. Neiss
S. Timothy Ball

The Bank of New York, etc.,
Objectant-Respondent.

Robert M. Redis

Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

Arthur M. Neiss

Decree, Surrogate's Court, New York County (Eve Preminger, S.), entered April 27, 1998, which, on objectant's motion, *inter alia* confirmed a referee report in part and rejected it in part, fixed legal fees for the law firm of Greene & Zinner, P.C., in principal amount of $174,000 fixed fees for the firm of Shea and Gould in the principal amount of $76,000, and settled and allowed petitioner's account as preliminary executrix, as adjusted pursuant to certain objections, with related relief, unanimously affirmed, with costs.

The challenged awards of attorney fees were proper exercises of the Surrogate's "unquestionably broad discretion" to fix such fees (*see, Matter of Estate of Urbach,* 252 AD2d 318, 322). The services for which the fees were awarded were related to exposing petitioner's misconduct (*see, Matter of Birnbaum v. Birnbaum,* 157 AD2d 177, 191, which has previously been noted by this Court (*see, Estate of Marsh,* 173 Ad2d 336, *appeal dismissed* 78 NY2d 990). We do not agree with petitioner that the proceedings were affected by judicial bias (*cf., Schrager v. New York Univ.,* 227 AD2d 189), nor do we find any defect in the referee's services. The bulk of petitioner's arguments on appeal are factual, and we decline to disturb the referee's findings of fact, accepted by the Surrogate, since those findings and the conclusions drawn therefrom rest upon a fair interpretation of the evidence (*cf., Estate of Clines,* 226 AD2d 269, *lv dismissed* 88 NY2d 1016). We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: October 26, 1999

S/ Catherine O'Hagan Wolfe
Clerk

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 8, 2000.

Present: Hon. Joseph P. Sullivan, Justice Presiding
Peter Tom
Israel Rubin
David B. Saxe
John T. Buckley, Justices.

In re Estate of Nicholas Marsh, etc.,
Deceased.

M-7708
M-7913
File No. 1980/88

Accounting of Adrienne Marsh Lefkowitz, etc.,

Application of Seha & Gould, etc.,

Application of Greene & Zinner, P.C.,

* * * *

Adrienne Marsh Lefkowitz,
Petitioner-Appellant,

Claudia M. Appelbaum, et al.,
Respondents-Respondents.

The Bank of New York, etc.,
Objectant-Respondent.

Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

Petitioner-appellant, Adrienne Marsh Lefkowitz, having moved by separate motions for reargument of the decision and order of this Court entered on October 26, 1999 (Appeal No. 2148) (M-7708), and for leave to appeal to the Court of Appeals from said order (M-7913),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions are denied, each with one bill of $100 costs payable to the responding parties.

ENTER:

S/ Catherine O'Hagan Wolfe
Clerk

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department of the County of New York, on July 15, 1999.

Present: Hon. Joseph P. Sullivan, Justice Presiding,
Milton L. Williams
Angela M. Mazzarelli
Alfred D. Lerner
Israel Rubin, Justices.

In the Matter of the Accounting of Adrienne Marsh Lefkowitz as Former Preliminary Executrix of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh, *Deceased.*

M-4212

File No. 1980/88

Application of Shea & Gould, Attorneys for Loretta M. Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, *Deceased.*

Surrogate's Court New York County

Application of Greene & Zinner, P.C.,
Attorneys for Claudia Marsh Appelbaum,
Remainder Beneficiary of the Estate of
Nicholas Marsh a/k/a Nicholas V. Marsh,
to Fix their Fees and to Receive Payment
of Such Fees from the General Assets of
the Estate of Nicholas Marsh,

Deceased.

----------x

Petitioner-appellant Adrienne Marsh Lefkowtiz, in connection with her appeal from an order of the Surrogate's Court, New York County, entered on or about April 27, 1998, having moved this Court for an order enlarging the record on appeal to include certain documents and for an extension of time to submit her responding brief,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED that the motion be and the same hereby is denied.

ENTER:

S/ Catherine O'Hagan Wolfe
Clerk

At a Surrogate's Court held in and for the County of New York, at 31 Chambers Street, in the City and County of New York, on the 23rd Day of April 1998.

File No. 1980/88

DECREE ON PRELIMINARY EXECUTOR'S ACCOUNTING

Present:

Honorable Eve Preminger, Surrogate.

---x

Accounting of Adrienne Marsh Lefkowitz as Former Preliminary Executrix of the Estate of

NICHOLAS MARSH
a/k/a Nicholas V. Marsh,

Deceased.

---x

Application of SHEA & GOULD, Attorneys for LORETTA M. FINE and LAUREN FINE, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix her Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, Deceased.

---x

Application of GREENE & ZINNER. P.C.,
Attorneys for CLAUDIA MARSH APPELBAUM,
Remainder Beneficiary of the Estate of
Nicholas Marsh, a/k/a Nicholas V. Marsh,
to Fix her Fees and to Receive Payment
of Such Fees from the General Assets
of the Estate of Nicholas Marsh, Deceased.

---

(1) Adrienne M. Lefkowitz, the aforesaid Preliminary Executor, by an accounting dated December 21, 1990, has accounted for her acts and proceedings as such Preliminary Executor and presented a petition to the Surrogate for a judicial settlement of such account for the period beginning March 15, 1988 and ending January 31, 1990 ("Adrienne M. Lefkowitz's Accounting") and at least seven months having elapsed since the granting of Preliminary Letters Testamentary to her, and the time to present claims against said estate having expired; and a Citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 22nd day of August, 1991, at nine-thirty o'clock in the forenoon of that day, then and there to attend such judicial settlement; and the said Citation having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York as preliminary executor of the Estate of Irene B. Marsh and as the named successor executor and trustee and preliminary executor under the Will of Nicholas V. Marsh, Claudia M. Appelbaum; Loretta M. Fine; Lauren Fine; Julie Lefkowitz; and Stuart Salles as temporary administrator of the Estate of Nicholas V. Marsh; and the Petitioner Preliminary Executor, Adrienne M.

Lefkowitz, having appeared *pro se* in the proceeding, and the Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P., and Claudia M. Appelbaum having appeared by her attorneys, Green & Zinner, P.C., and Loretta M. Fine having appeared initially by Shea & Gould, but Shea & Gould having been dissolved and Rivkin, Radler and Kremer and S. Timothy Ball having subsequently appeared for Loretta M. Fine and Stuart Salles having appeared in the proceeding *pro se,* and a verified answer to the Preliminary Executor's petition and objections dated August 21, 1991 to Adrienne M. Lefkowitz's Accounting having been filed by the Bank of New York, as fiduciary of the Will of Nicholas V. Marsh, and such answer and objections having been amended through an amended answer and objections dated July 22, 1993 ("The Bank of New York's Objections"), and Adrienne M. Lefkowitz having filed a reply to the amended objections dated August 23, 1993:

(2) Schulte, Roth & Zabel, L.L.P. (formerly known as Schulte, Roth & Zabel), by a petition dated August 17, 1989, having sought an order fixing the fees and disbursements of Schulte, Roth & Zabel, L.L.P. payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated August 24, 1989, directed to Adrienne M. Lefkowitz, as then acting preliminary executor of the Estate, and Stuart Salles, as then acting temporary administrator of the Estate, citing and requiring them each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 29th day of September, 1989 at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh, and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon Adrienne M.

Lefkowitz and Stuart Salles, and Adrienne M. Lefkowitz having appeared by her attorneys, Etra & Etra, and a verified answer and counterclaim to the petition of Adrienne M. Lefkowitz dated September 28, 1989 having been filed, and a verified answer to counterclaim dated October 17, 1989 having been filed by Schulte, Roth & Zabel, L.L.P., and The Bank of New York, as successor executor of the Estate of Nicholas V. Marsh, having appeared in this proceeding by its attorneys, McCarthy, Fingar, Donovan, Drazan & Smith, L.L.P.; and William D. Zabel of the law firm of Schulte, Roth & Zabel, L.L.P. having filed an affidavit of legal services sworn to October 21, 1991 in the within accounting proceeding;

(3) Greene & Zinner, P.C. by a petition dated October 26, 1992, having sought an order fixing the fees and disbursements of Greene & Zinner, P.C. payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated November 4, 1992, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 8th day of December, 1992, at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh; and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York as preliminary executor of the Estate of Irene B. Marsh and as executor and trustee under the Will of Nicholas V. Marsh; Adrienne M. Lefkowitz; Loretta M. Fine; Lauren Fine; Julie Lefkowitz; and Greene & Zinner, P.C. having appeared *pro se* in this proceeding and Adrienne M. Lefkowitz having appeared *pro se* in this proceeding and The Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith,

L.L.P., and Loretta M. Fine having appeared initially by Shea & Gould, but Shea & Gould having been dissolved and Rivkin, Radler and Kremer and S. Timothy Ball having subsequently appeared for Loretta M. Fine, and a verified answer to the petition dated December 10, 1992 having been filed by The Bank of New York, and a verified answer to the petition dated November 25, 1992 having been filed by Adrienne M. Lefkowitz, and Adrienne M. Lefkowitz having filed an affidavit in opposition to affidavit of legal services sworn to November 25, 1992 and the Court having made a decision and order dated January 12, 1993 consolidating the proceeding to fix fees of Greene & Zinner, P.C. with the proceeding of Adrienne M. Lefkowitz to approve her accounting as preliminary executor of the Estate of Nicholas V. Marsh;

(4) Shea & Gould by a petition dated January 27, 1992, having sought an order fixing the fees and disbursements of Shea & Gould payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated February 3, 1992, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 18th day of February, 1992, at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh; and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York, as preliminary executor of the Estate of Irene B. Marsh and as preliminary executor and as the named successor executor and trustee under the Will of Nicholas V. Marsh; Adrienne M. Lefkowitz; Claudia M. Appelbaum; Lauren Fine; Julie Lefkowitz; and Shea & Gould having appeared *pro se* in this proceeding, and Adrienne M. Lefkowitz

having appeared *pro se* in this proceeding, and The Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P., and Claudia M. Appelbaum having appeared by Greene & Zinner, P.C., and a verified answer to the petition dated February 24, 1992 having been filed by The Bank of New York, and a verified answer to the petition dated February 11, 1992 having been filed by Adrienne M. Lefkowitz, and Adrienne M. Lefkowitz having filed an affidavit in opposition to affidavit of legal services sworn to February 11, 1992, and the Court having made a decision and order dated October 21, 1992 consolidating the proceeding to fix fees of Shea & Gould with the proceeding of Adrienne M. Lefkowitz to approve her accounting as preliminary executor of the Estate of Nicholas V. Marsh;

And the Court having rendered a decision and order dated January 27, 1994 appointing David Rudenstine as Referee ("the Referee") to hear and report in these proceedings, and The Bank of New York having filed a Proposed Findings of Fact and Conclusions of Law dated March 30, 1995, and Adrienne M. Lefkowitz having filed a Proposed Findings of Fact and Conclusions of Law dated March 31, 1995, and Adrienne M. Lefkowitz having filed a Response dated May 3, 1995 to The Bank of New York's Proposed Findings of Fact and Conclusions of Law, and a hearing having taken place before the Referee, and the transcripts of proceedings before the Referee having reflected various rulings as to discovery and other trial motions and applications and withdrawals and/or adjustments in The Bank of New York's Objections, and the Referee having filed his report dated December 1, 1995 ("Report of the Referee"), and by Notice of Motion dated March 30, 1995 and affidavit sworn to March 27, 1995. Adrienne M. Lefkowitz having moving [sic]for directed verdict as to certain issues in these proceedings and The Bank of New

York having opposed such motion; and by Notice of Motion dated March 29, 1996 and affidavit sworn to March 26, 1996, Adrienne M. Lefkowitz having moved to confirm in part and reject in part the Report of the Referee and for other relief and The Bank of New York having opposed such motion; and by affidavit sworn to August 31, 1996, Adrienne M. Lefkowitz having offered further support of her motion and by Notice of Motion dated May 29, 1996 and the affidavit of Robert M. Redis sworn to May 29, 1996. The Bank of New York having moved to confirm in part and reject in part the Report of the Referee; and by affidavit of Adrienne M. Lefkowitz sworn to May 20, 1996. Adrienne M. Lefkowitz having opposed such motion; and the affidavit of Robert M. Redis sworn to September 6, 1996. The Bank of New York having offered further support for its motion; and the Court having rendered a decision in writing dated July 29, 1997;

By Notice of Motion dated August 25, 1997, Greene & Zinner, P.C. having moved for reargument and reconsideration of this Court's decision dated July 29, 1997, and upon reading and filing the Notice of Motion dated August 25, 1997 and the affidavit of Andrew Greene sworn to August 25, 1997 in support of such motion; the affidavit of Adrienne M. Lefkowitz sworn to September 5, 1997 in opposition to such motion, and the affirmation of S. Timothy Ball dated September 11, 1997 in response to such motion; and the affidavit of Robert Redis sworn to September 9, 1997 in response to such motion, and the affidavit of Andrew Greene sworn to September 11, 1997 in further support of such motion;

By Notice of Motion dated September 11, 1997, S. Timothy Ball, formerly of Shea & Gould, having moved for reargument and reconsideration of this Court's decision dated July 29, 1997 as to fixation of fees of Shea & Gould, and upon reading and filing the Notice of Motion dated September 11,

1997 and affirmation of S. Timothy Ball dated September 11, 1997 in support of such motion, the affidavit of Adrienne M. Lefkowitz sworn to September 16, 1997 in opposition to such motion; and the affidavit of S. Timothy Ball sworn to September 24, 1997 in further support of such motion;

By Notice of Motion dated September 22, 1997, Adrienne M. Lefkowitz having moved for reargument and reconsideration of this Court's decision dated July 29, 1997, and upon reading and filing the Notice of Motion dated September 20, 1997, the affidavit of Adrienne Marsh Lefkowitz sworn to September 30, 1997, the affidavit of Robert M. Redis sworn to October 3, 1997 in opposition to such motion, the affidavit of Adrienne M. Lefkowitz sworn to October 8, 1997 in further support of such motion;

And the Court having rendered a decision in writing dated February 2, 1998 and appearing in the February 6, 1998 issue of the New York Law Journal and the said matter having been duly adjourned to this day.

Now, upon the motion of McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P, it is

ORDERED, ADJUDGED AND DECREED, that except as otherwise stated in this decree, the Report of the Referee is confirmed in all aspects; and it is

ORDERED, ADJUDGED AND DECREED, that the motion of Adrienne M. Lefkowitz for reargument and reconsideration of this Court's decision dated July 29, 1997 is denied in all respects, and if is further

ORDERED, ADJUDGED AND DECREED, that the motion of the law firm Greene & Zinner, P.C. for reargument and reconsideration of the Court's decision dated July 29, 1997 is granted and the petition for legal fees of the law firm of Greene & Zinner, P.C. is granted to the extent that the legal fees for such firm are fixed and determined in the amount of

$174,000, plus simple interest at the rate of 9% from the date of this Court's February 2, 1998 decision, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such amount and shall charge such amount against the distributable share of Adrienne M. Lefkowitz; and it is further

ORDERED, ADJUDGED AND DECREED, that the motion of S. Timothy Ball for reargument and reconsideration of this Court's decision dated July 29, 1997 as to the legal fees of Shea & Gould is granted and the petition for legal fees of the law firm of Shea & Gould is granted to the extent that the legal fees of Shea & Gould are fixed and determined in the amount of $76,000, plus simple interest at 9% from the date of this Court's February 2, 1998 decision, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such amount and shall charge such amount against distributable share of Adrienne M. Lefkowitz; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #7 of The Bank of New York's Objections is partially sustained and Schedules A and G of Adrienne M. Lefkowitz's Accounting are hereby revised to indicate a value of zero for the decendant's "Personal Property" in the Sherry Netherland's deposit box and personal property; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(a) of The Bank of New York's Objections is partially sustained and Schedule A of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a value os $48,644.13 for the decedent's interest in Marsh Oil Associates; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(b) of The Bank of New York's Objections is sustained and Schedule A-1 of Adrienne M. Lefkowitz's

Accounting is hereby revised as follows: to describe the moneys realized as a collection of the decedent's interest in Marsh Oil Associates on November 3, 1989, and to describe an inventory Value of $48,644.13 and Proceeds or Distribution Value of $48,644.13 for the decedent's interest in Marsh Oil Associates, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(c) of The Bank of New York's Objections is partially sustained to Schedule F of Adrienne M. Lefkowitz's Accounting to the extent that $21,136.51 of Davies & Co., Inc.- Loan for Marsh Oil Associates on Schedule F. pages 1 and 3, are recharacterized as disbursements on Schedule C of Adrienne M. Lefkowitz's Accounting, and the disbursement of estate assets to Davies & Co., Inc. on December 21, 1988, in the amount of $3,708.07 on March 10, 1989, in the amount of $1,358.42 on May 18, 1989, in the amount of $1,608.12 on August 16, 1989, in the amount of $1,347.36 and on September 18, 1989, in the amount of $5,074.35 are disallowed and Adrienne M. Lefkowitz is surcharged and directed to pay The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $13,095.32 plus simple interest calculated at the rate of 3.5% from the dates of the disallowed disbursements to date of this Court's July 29, 1997 decision and thereafter at the rate of 9% and the disbursement of estate assets to Davies & Co., Inc. on July 28, 1988 and September 1, 1988 in the aggregate amount of $8,040.19 shall be allowed; and that Schedule G of Adrienne M. Lefkowitz's Accounting shall reflect a receivable for such disallowed expenses in the amount of $13,095.32, plus interest, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #18 of The Bank of New York's Objections is sustained to Schedule C of Adrienne M. Lefkowitz's Accounting and the disbursement of estate assets to Joseph

Markovits, Inc. on May 6, 1988 in the amount of $2, 563.63 is disallowed and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $2,563.63, plus simple interest calculated at the rate of 3.5% from the date of the disallowed disbursement to the date of this Court's July 29, 1997 decision and thereafter at 9% and that Schedule G of Adrienne M. Lefkowitz's Accounting shall reflect a receivable for such disallowed expense in the amount of $2,563.63, plus interest, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #20 of The Bank of New York's Objections is partially sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting in which Adrienne M. Lefkowitz seeks reimbursement of expenses for "funeral, legal and other estate expenses" in the amount of $58,408.77 and that portion of these expenses for Funeral Expenses, Transcripts and Other Administration Expenses in the aggregate amount of $27,532.74 are hereby approved and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay to Adrienne M. Lefkowitz $27,532.74; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #22 of The Bank of New York's Objections is sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting entitled "Graham & James, Hong Kong attorneys - $4,164.08 and the request for approval of attorney fees of Graham & James, Hong Kong Attorneys, is hereby disallowed in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #24 and 25 of The Bank of New York's Objections is sustained t that portion of Schedule C-1 and D of Adrienne M. Lefkowitz's Accounting in which she seeks approval of claims for services rendered during the decedent's lifetime and

after his death to Joseph Markovits, Inc.and Floral Masquerade, Inc. in the aggregate amount of $1,295,860, and such claims are disallowed in their entirely; and it is further.

ORDERED, ADJUDGED AND DECREED, that Objection #36 of The Bank of New York's Objections is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #26 of The Bank of New York's Objections is partially sustained as to payments made to the Hong Kong Inland Revenue Department for penalties on October 8, 1992 in the amount of HK$100,000 and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of HK$100,000, plus simple interest calculated at the rate of 3.5% from October 8, 1992 to date of this Court's July 29, 1997 decision and thereafter at 9%, and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #27 and #28 of The Bank of New York's Objections are sustained as to Schedule F of Adrienne M. Lefkowitz's Accounting to the extent of disbursements of estate assets to Floral Masquerade, Inc. on June 22, 1988 in the amount of $500,000 and to NVM Capital Corp. on June 22, 1988 in the amount of $1,000,000, and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $1,214,000, plus simple interest calculated at the rate of 3.5% from October 6, 1989 to date of this Court's July 29, 1998 decision and thereafter at 9%, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #31 of The Bank of New York's Objections is sustained and Schedule G of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a fair market value as of January 31, 1990 of less than $150,000 for the decedent's

interest in NVM Capital Corp.; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #29 of The Bank of New York's Objections is sustained and Schedule G of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a fair market value as of January 31, 1990 of $175,000 for the decedent's interest in Floral Masquerade, Inc.; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #32 of The Bank of New York's Objections is sustained and Schedules E and E-1 are hereby revised to strike the portions thereof in which distributions made to Irene B. Marsh during her lifetime are to be treated as advances and repaid to the Estate of Nicholas V. Marsh; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #19 of The Bank of New York's Objections is sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting in which she seeks receiving and paying commissions as preliminary executor of the estate in the aggregate amount of $102,264.47, and such claim is disallowed in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #12(b) of The Bank of New York's Objections is overruled and the unpaid legal fees of the law firm of Schulte, Roth & Zabel, L.L.P, are fixed and determined in the amount of $55,792.30 plus simple interest at 9% from the date of this Court's July 29, 1997 decision and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fees; and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #13 of The Bank of New York's Objections in relation to legal fees paid to the law firm of Kaye, Scholer, Fierman, Hays & Handler is overruled; and it is further

ORDERED, ADJUDGED AND DECREED, that the fee of Robert N. Swetnick, Esq., as Referee, is hereby fixed and determined in the amount of $6,750, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fee; and it is further

ORDERED, ADJUDGED AND DECREED, that the claim in Schedule K of Adrienne M. Lefkowitz's Accounting in which Adrienne M. Lefkowitz seeks damages as a result of temporary restraining orders imposed on January 31, 1990 is denied, and it is further

ORDERED, ADJUDGED AND DECREED, that the cross motion of The Bank of New York for sanctions in relation to the motion in 1991 of Adrienne M. Lefkowitz for reargument and/or renewal of her removal as preliminary executor is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that the motion of Adrienne M. Lefkowitz for a directed verdict dismissing portions of The Bank of New York's Objections is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that the unpaid accounting fees of Hoberman, Miller & Co. are fixed and determined in the amount of $8,635, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fee; and it is further

The said Surrogate, after having examined the said account and determining said motions, finds the state and condition of the said account to be as stated and set forth in the following Summary Statement thereof, made by the said Surrogate as judicially settled and adjusted by her to be recorded with and taken to be a part of the Decree in this matter, to wit:

A Summary Statement of the Account of ADRIENNE M. LEFKOWITZ as Preliminary Executor of the Estate of NICHOLAS V. MARSH, deceased, made by the Surrogate as

judicially settled and allowed.

The said Preliminary Executor shall be charged with:

The amount of Schedule "A".	$6,247,160.43
The amount of Schedule "A-1"	13,650.00
The amount of Schedule "A-2"	181,828.87
	6,442,639.30

The said Preliminary Executor shall be credited with:

The amount of Schedule "B"	$ 5,442.00
The amount of Schedule "C"	253,961.36
The amount of Schedule "C-2"	34,866.06
The amount of Schedule "D"	533,265.64
The amount of Schedule "E"	373,000.00
The amount of Schedule "E-1"	142,000.00
	$1,342,635.06

in cash, leaving a balance in her hands of principal consisting of $504,484.43 receivables of $15,659.95 and $4,574,897.05 in other property making in all the sum of $5,095,041.43 as shown by Schedule "G" of said accounting: and a balance of income consisting of $4,962.81 in cash as a shown by Schedule "G-1" of said account, making a combined total of principal and income in the amount of $5,110,004.24.

AND the Preliminary Executor's account having been adjusted by the Surrogate and a summary of the same having been made as above and herewith recorded, it is

ORDERED ADJUDGED AND DECREED, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted; and it is further

ORDERED, ADJUDGED AND DECREED, that out of the balance of principal and income so found, as above the

Preliminary Executor shall distribute to The Bank of New York as executor of the Estate of Nicholas V. Marsh the remaining principal and income; and it is further.

ORDERED, ADJUDGED AND DECREED, that upon complying with the provision of this Decree, said Preliminary Executor, in her own right and as Preliminary Executor aforesaid, be and she is hereby discharged from any and all further liability, responsibility and accountability with respect to any and all matters as set forth in said account and in this Decree.

S/ Eve Preminger
Surrogate

New York Law Journal
February 6, 1998, Friday

SECTION: COURT DECISIONS; Pg. 27

NEW YORK COUNTY SURROGATE'S COURT

Surrogate Preminger

ESTATE OF NICHOLAS MARSH, a/k/a NICHOLAS V. MARSH, Deceased. -- Adrienne Marsh Lefkowitz ("Lefkowitz") and the attorneys for the beneficiaries move for reargument of the Court's July 29, 1997 decision, which confirmed in part and rejected in part the report of the Referee in this contested accounting.

Lefkowitz' motion for reargument is denied. Her papers contest issues previously decided, and fail to demonstrate that the Court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (See, Pahl Equipment Corp. v. Kassis et al, 182 AD2d 22; Schheider v. Solowey, 141 AD2d 813).

The attorneys for the beneficiaries have established, however, that the Court underestimated the extent to which their services benefitted this estate in the removal proceeding and in the identification of estate assets. Greene & Zinner, counsel for Claudia Marsh Applebaum, acted as lead counsel in the removal proceeding. The firm prepared for and presented evidence at the removal proceeding concerning Lefkowitz' alleged mismanagement of the estate. In addition, it appears that Greene & Zinner were responsible for investigating and

identifying estate assets. some of which were ultimately located in Hong Kong. Moreover, they assisted in the management of the estate corporations after Lefkowitz was removed. As for Shea & Gould, the attorneys for Loretta and Lauren Fine, the firm actively participated in the removal proceeding and aided in the ultimate result.

Accordingly, the motions for reargument by the attorneys for the beneficiaries are granted, and upon reargument the report of the referee is modified to the extent that the fees of Greene & Zinner are fixed in the sum of $ 174.000 and the fees for Shea & Gould are fixed in the sum of $ 76.000 (Matter of Freeman, 40 NY2d 397; Matter of Potts, 241 NY 593; Matter of Bellinger, 55 AD2d 448). Such fees shall be charged directly against Lefkowitz' share of the estate pursuant to the July 29, 1997 decision. This award is without prejudice to counsel seeking the balance of their fees directly from their clients.

Resettle decree.

Note:
The official version of this decision could not be located at Surrogate's Court.

Surrogate's Court: New York County

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Accounting of Adrienne Marsh Lefkowitz as former Preliminary Executrix of the Estate of

NICHOLAS MARSH,
a/k/a NICHOLAS V. MARSH,

Deceased. File No. 1980/88

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Application of Shea & Gould, Attorneys for Loretta M Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate.

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Application of Green & Zinner, P.C., Attorneys for Claudia Marsh Applebaum, Remainder Beneficiary of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of such Fees from the General Assets of the Estate.

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Preminger, S.

In this contested accounting by the removed preliminary executor, Adrienne Marsh Lefkowitz, the various parties have moved to either confirm in part or reject in part the report of the referee, David Rudenstine, Esq., which was rendered after 48 days of trial. The account is for the period from Ms. Lefkowitz's appointment as preliminary executor on April 25, 1988 through her removal on April 24, 1990 (see, Matter of Marsh, NYLJ, April 24, 1990, at 24, col 5, affd 173 AD2d 336, appeal dismissed 78 NY2d 990; appeal denied 79 NY2d 751).

Nicholas Marsh was survived by his wife, Irene and three daughters, Adrienne Marsh Lefkowitz, Loretta Fine and Claudia Applebaum. Under his will, decedent left the bulk of his estate in a marital trust for Irene's benefit, remainder to his three daughters as follows: 30 % outright to Adrienne, 30 % in further trust for Claudia, 20 % in further trust for Loretta and 20% in further trusts for the benefit of his two granddaughters. Irene post-deceased on May 13, 1990. Ms. Lefkowitz was named the sole executor under a codicil. After Ms. Lefkowitz was removed, The Bank of New York (BNY) succeeded as the executor and trustee of decedent's estate. BNY was also appointed the executor of Irene's estate.

BNY filed objections to Ms. Lefkowitz's account in both its fiduciary capacities. The other beneficiaries have also appeared by counsel. Although the beneficiaries have not filed objections to the account, their attorneys seek compensation from the estate for services rendered in the removal proceeding. In that regard, Ms. Lefkowitz seeks to apply the *pro tanto* rule, which provides that where an objectant is a person with less than 100 % interest in the estate, the return of any assets applies only

to the extent that the objecting party is damaged (*Matter of Garvin,* 256 NY 518; *Matter of Fuller,* 10 AD2d 938, *affd* 9 NY2d 943; *Matter of Zalzanick,* 90 Misc 2d 113), by requesting that any surcharge imposed be limited to Irene's share of the estate. However, the *pro tanto* rule is applicable only where all of the beneficiaries are necessary parties to the proceeding. Here, BNY as the successor executor, is the only necessary party to the preliminary executor's account (see, SCPA 2210 [4]). Thus, to the extent that BNY is successful in its objections the recovery shall inure to all persons interested in this estate.

Since decedent's death on March 15, 1988, this estate has been beset by litigation most of which stems from Ms. Lefkowitz's conduct. The record reveals that her involvement and control over decedent's assets began in May, 1985 after he suffered a paralyzing stroke. Thus, by the time Ms. Lefkowitz was appointed as preliminary executor, she was fully familiar with the composition of the estate, which consisted of various business interests and bank accounts in New York, Hong Kong and Switzerland.

The primary objection involves Ms. Lefkowitz's mismanagement of decedent's closely held business, Joseph Markovits, Inc. (JMI), a wholesale artificial flower company. By prior decision, Ms. Lefkowitz was removed for improvidence in transferring estate assets to the family businesses, self dealing in her attempt to acquire the proceeds of certain assets in Hong Kong and for her willful refusal to obey court orders (Matter of Marsh, supra). The issue of whether a surcharge was warranted was to abide her accounting. After a protracted hearing on Ms. Lefkowitz's accounting, the referee has reported to the court and recommends sustaining many of BNY's objections as well as imposing a substantial surcharge for her flagrant

mismanagement of this estate. The objections by BNY, requests for fees by the beneficiaries counsel and recommendations of the referee are determined as follows:

With respect to Schedule A, assets collected, Ms. Lefkowitz failed to establish the value of decedent's personal property, which is her burden (see, *Matter of Warhol,* NYLJ, April 4, 1994, at 29, col 5). BNY's objection to the value stated in the account is sustained in accordance with the referee's report.

The objection raised to Ms. Lefkowitz's treatment of Marsh Oil Co., which leased oil and gas wells, is sustained to the extent of the referee's report. The record establishes that Ms. Lefkowitz failed to act promptly in having this asset appraised. Has she done so, she would have learned that the asset was worthless and any expenses paid would simply result in a loss to the estate. Accordingly, Ms. Lefkowitz is surcharged in accordance with the referee's report for the expenses paid to Davies & Co. after decedent's death in the amount of $13,096.32. Additionally, Marsh Oil Co. shall be identified on Schedule A at $48,644.

BNY objects to Ms. Lefkowitz's failure to include as an estate asset, $500,000 she received as a gift from decedent, which violated an agreement he had with his post-deceased wife. The agreement provides that "neither will revoke his or her Will, disposing of his or her property at death, without the consent of the other." The evidence clearly proves that the $ 500,000 transfer was a gift from decedent to Ms. Lefkowitz. However, the parties were at liberty to dispose of their property during their lifetimes, "short of making a different testamentary disposition or a gift to defeat the purpose of the agreement" (*Rastetter v.*

Hoenninger, 214 NY 66; *see also, Schwartz v. Horn,* 31 NY2d 275; *Matter of Schuman,* NYLJ, October 15, 1992, at 29, col 3). Here, while the amount of the gift is substantial it forms only a nominal part of decedent's gross estate which is in excess of $ 15.5 million. Accordingly, the referee's recommendation to deny the inclusion of the amount of the gift as an estate asset is confirmed.

With respect to administration expenses, Ms. Lefkowitz failed to justify expenses she purportedly paid in the amount of $2,563.63 for which amount she is surcharged (*Matter of Shulsky,* 34 AD2d 545, app den 27 NY2d 743) or establish the right to reimbursement for legal fees paid to attorneys in New York and Hong Kong (*see, Matter of O'Donnell,* 28 Misc 2d 1040; *Matter of Puma,* NYLJ, October 27, 1989, at 30, col 5). None of the legal services appear to have been rendered for the benefit of the estate. It is noted that during this period, Ms. Lefkowitz disregarded this court's repeated direction that she commence proceedings in Hong Kong for the appointment of an ancillary fiduciary (*see, Matter of Marsh,* supra). Moreover, legal fees incurred by a fiduciary in unsuccessfully defending oneself against surcharge may not be paid from the estate (*Matter of Hildreth,* 274 App Div 611, *aff'd* 301 NY 705; *Matter of Chiesa,* 23 AD2d 562). Accordingly, the recommendation of the referee is confirmed with respect to denial of her request for reimbursement of $30,532.74 paid to various attorneys and $4,164.08 paid to Graham & Young. The fees sought by the firms of Kaye, Scholar, Fierman, Hayes & Handler and Schulte, Roth & Zabel are allowed in the amounts requested. The proof establishes that the services rendered by each firm were for the benefit of the estate. (*Matter of Potts,* 213 App Div 59, *aff'd* 241 NY 593; *Matter of Freeman,* 34 NY2d 1). The balance of the administration expenses incurred by Ms. Lefkowitz, in the sum of $27,532.74 are allowed.

Ms. Lefkowitz seeks to be paid personally for her services rendered to the family businesses, JMI and Floral Masquerade, Inc. (Floral) in the amount of $1,295.860. This imaginative request is wholly unsupported.

BNY demonstrated that Ms. Lefkowitz never received compensation in amounts near those she seeks in this accounting. Her salary for mid 1986 through 1987 was $150,000. While the corporate resolutions provide that the officers may pay the Chief Operating Officer a bonus, no such bonuses were paid during decedent's lifetime.

The evidence establishes that Ms. Lefkowitz grossly mismanaged the decedent's business interests. During Ms. Lefkowitz's tenure, JMI suffered losses of approximately $6 million. JMI had its best year in 1984 with gross sales of $24 million and profits of $850,000. In 1988 sales decreased to $17.2 million and operating losses totaled $ 2.1 million. In 1988, an auditor, Ernst & Young, questioned the ability of JMI to continue as a going concern. Floral, which was incorporated in 1987, had a limited function only after decedent died. Thus, the performance of these corporations does not establish the right to any compensation, let alone a bonus of over a million dollars. Accordingly, her request for compensation for services to the corporations is denied.

The other beneficiaries appeared by counsel who seek fees related to services rendered in the removal proceeding. Claudia Applebaum appeared by Greene & Zinner who seeks $257,000 and Loretta and Laura Fine by Shea & Gould who seeks $267,000. The referee recommends denial of these fees from estate assets because the attorneys' services did not benefit the estate. Although both firms appeared and participated in the

removal proceedings, BNY's counsel took the lead role in successfully obtaining Ms. Lefkowitz's removal. Thus, the services of the attorneys for the beneficiaries were duplicative and did not enhance the estate and are accordingly denied without prejudice to recovery from their clients.

The court, however, is mindful of the impact the payment of the substantial fees charged by BNY's counsel, as well as their own counsel, will have upon the beneficiaries, through no fault of their own. Such fees were incurred solely as a result of the need to redress Ms. Lefkowitz's improvident conduct. It would be inequitable to now make the other beneficiaries bear the entire expense.

Despite the general rule that a party to a lawsuit cannot require his adversary to pay his legal expenses (*Matter of A. G. Ship Maintenance Corp. v. Lezak,* 69 NY2d 1), an errant fiduciary may be surcharged for the legal expenses incurred in establishing his wrongdoing and obtaining recoupment (Matter *of Garvin,* 256 NY 518; *Matter of Hidden,* 243 NY 499, motion denied 244 NY 563; *Parker v. Rogerson,* 49 AD2d 689; Matter *of Miller,* NYLJ, August 30, 1995, at 25, col 5). Ms. Lefkowitz's conduct which precipitated the removal proceeding is such a case. Accordingly, the legal fees incurred by counsel to BNY in the removal proceeding shall be charged directly against Ms. Lefkowitz's share of the estate. The amount of such fees shall abide the final determination of the fees to be paid BNY's attorneys. This ruling is without prejudice to BNY's application to have additional fees of its attorneys paid from Ms. Lefkowitz's share in the estate.

Finally, on the issue of expenses, the fee of Robert Swetnick, Esq. is allowed in the sum of $6,500.

We turn now to the requests for surcharge.

The Hong Kong Inland Revenue Department (akin to the Internal Revenue Department) imposed a penalty of HK 200,000 for certain delays in filing an Estate Duty Affidavit (in which the estate assets are identified) and a corrective affidavit. During the period Ms. Lefkowitz acted as preliminary executor she never made any effort to have an ancillary fiduciary appointed in Hong Kong. As noted, she was admonished by this court for such failure. In fact, one of the grounds for Ms. Lefkowitz's removal was her self dealing in seeking to acquire the proceeds of a pension fund in Hong Kong. It appears that her failure to arrange for a fiduciary in Hong Kong was deliberate. The Estate Duty Affidavit was required to be filed within a year of decedent's death. Thus, Ms. Lefkowitz is responsible for the penalty imposed on such delay. However, there is no explicit finding by the Hong Kong Inland Revenue Department that the entire penalty was imposed as a result of her delay. Rather, the proof indicates that a portion of the penalty may be the result of the delay by the ancillary administrator, appointed after BNY began acting as executor, in filing a corrective affidavit. Notwithstanding the finding of the Hong Kong authorities, the referee recommends surcharging Ms. Lefkowitz for the entire penalty. The court disagrees. Ms. Lefkowitz is surcharged for one-half of the penalty, with interest.

The primary objection pertains to loans Ms. Lefkowitz made to JMI. Within three months of decedent's death, she transferred $1,500,000 of estate assets to two non-operating corporations which were wholly owned by decedent, Floral and

NVM Capital Corp. (NVM). There is not a scintilla of evidence that the transfers to Floral and NVM were of any benefit to the estate. At the time of the transfers to Floral and NVM, the estate had just $1.9 million in liquid assets. [1]Such transfers have already been determined to be improvident (*Matter of Marsh, supra*).

In 1989 Ms. Lefkowitz transferred to JMI $1,050,000 from NVM and $250,000 from Floral. While NVM and Floral were wholly owned by decedent, he only held a 50 % interest in JMI. Irene owned the other half of JMI. Thus, the immediate effect of these transfers was to diminish the value of the estate assets. JMI never repaid either loan. Clearly, these transfers, made to a corporation which was spirally downward, were highly imprudent and placed the estate assets at extreme risk. Essentially, Ms. Lefkowitz gambled with the estate assets.

Negligence is defined as the failure to use such care as a reasonably prudent person would use under such circumstance (*Matter of Donner,* 82 NY2d 574; *Matter of Acker,* 128 AD2d 867; *Matter of Lippner,* 135 Misc 2d 34). Ms. Lefkowitz's actions, which commenced after her father's stroke, set in motion the precipitous decline of JMI. She then risked estate assets by moving them first to non-functioning corporations and then to JMI in order to continue a failing corporation, all without regard to the effect such transactions would have upon the estate. Such actions constitute gross negligence (*see, Matter of Etoll,* 101 AD2d 935).

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[1] In affirming this court's removal of Ms. Lefkowitz, the Appellate Division noted that the transfers created a liquidity crisis for the estate, the consequence of which substantially harmed decedent's wife who was seriously ill and in dire need of funds.

JMI was ultimately sold for $ 2.1 million of which decedent's estate received $1,812,650.53. BNY has established that 14 percent of the sales price is allocable to the loans from Floral and NVM. Accordingly, the referee's recommendation that Ms. Lefkowitz be surcharged in the amount $ 1,214,000 (the amount of the unpaid loans less their interest in JMI), plus interest from October 6, 1989, is confirmed.

Based upon the uncontroverted loss to the estate caused by the preliminary executor's actions, mismanagement of assets and self serving applications she is surcharged in accordance with the above directives. Finally, where a fiduciary's mismanagement of an estate is so flagrant, denial of commissions in addition to surcharge is warranted (*Matter of Pati,* 151 AD2d 1006; *Matter of Acker,* 128 AD2d 867; *Matter of Seabury,* NYLJ, May 17, 1995, at 28; *Matter of May,* NYLJ, March 8,1994, at 31, col 2, *Matter of Puma,* NYLJ, October 27, 1989, at 30, col 5). This is such a case. Ms. Lefkowitz has ignored her fiduciary responsibility and exhibited a total disregard for the interests of the beneficiaries of this estate. Accordingly, she is denied commissions.

The referee's report is confirmed in all other respects.

Settle decree.

S/ EP
Surrogate's

Dated: July 29, 1997

New York Law Journal
February 1, 1994, Tuesday

SECTION: COURT DECISIONS; NEW YORK COUNTY; SURROGATE'S COURT: Pg. 23

Surrogate Preminger

Estate of NICHOLAS MARSH, a/k/a Nicholas V. Marsh, dec'd The pending contested accounting of the former preliminary executor and applications for legal fees are referred to David Rudenstine, Esq. For trial (SCPA 506) which shall commenced [sic] on Thursday, March 3, 1994 at 10 A.M. and continue on March 4, 1994. A pretrial conference is scheduled for Friday, February 18, 1994 at 11 A.M. in room 614.

The referee shall be entitled to receive a fee based upon his usual hourly rate together with reasonable expenses (SCPA 506 (5)) which shall be determined upon the conclusion of the hearing and after a review of his affidavit.

Note: The official version of this decision could not be located at Surrogate's Court.

Surrogate's Court: New York County

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In the Matter of the Accounting of the Bank of New York, as Executor of the Estate of

NICHOLAS MARSH, a/k/a NICHOLAS V. MARSH,

Deceased.

File No: 1980/88

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In the Matter of the Application of Adrienne Marsh Lefkowitz to Revoke the Letters Testamentary Issued to the Bank of New York, as Preliminary Executor of the Estate of

NICHOLAS V. MARSH,

Deceased.

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Accounting of Stuart Salles as Temporary Administrator of the Estate of

NICHOLAS V. MARSH,

Deceased.

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Preminger, S.

This application to vacate the appointment of a referee and for recusal is denied in accordance with the Court's decision on the record following oral argument on May 9, 1997.

This memorandum, together with the transcript of the May 9, 1997 proceedings, shall constitute the order of the Court.

S/
Surrogate

Dated: May 16, 1987

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of June 2000

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

1-10 Mo. No. 474
In the Matter of Nicholas Marsh,etc.,
Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

In the Matter of Shea & Gould, etc.,

In the Matter of Greene & Zinner, P.C. & etc.

Adrienne Marsha [sic] Lefkowitz,
Appellant,
Claudia M. Appelbaum, et al.,
Respondents,
The Bank of New York, etc.,
Objectant-Respondent,
Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

CONSTITUTION OF THE UNITED STATES

AMENDMENT I-FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor` shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

*** THIS SECTION IS CURRENT THROUGH CH. 609, 01/28/2001 ***

SURROGATE'S COURT PROCEDURE ACT
ARTICLE 5. TRIALS AND HEARINGS

NY CLS SCPA @ 506 (2000)

@ 506. Reference to hear and report

1. In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report.

2. No referee to examine an account rendered or to report questions arising upon the settlement of the account shall be appointed where the estate does not exceed $1,000 in value or in any case where the item or items in such account to which objections have been made do not aggregate more than $200, except that in any such proceeding the court may appoint a referee to serve without compensation.

3. A referee shall have the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. The referee shall file his report within 30 days after the matter has been finally submitted. Unless otherwise stipulated a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report.

4. Upon the motion of any party or on its own initiative the court may confirm or reject in whole or in part the report of the referee; may make new findings with or without taking additional testimony or may order a new reference. Any party to the proceeding may serve notice of the filing of the report. Unless the motion be made within 60 days after service of notice of the filing of the report, it shall be deemed confirmed. Where no issues remain to be tried the court shall file its decision in writing.

5. The compensation and expenses of such a referee shall be fixed and allowed as provided by CPLR 8003(a) and 4321, except as limited by subdivision 2.

6. (a) Upon the consent of the attorneys for all parties who have appeared at the hearing, the court may designate the chief clerk, one of the other clerks, a [fig 1] court attorney or any assistant to take the testimony in any proceeding other than one where a right to trial by jury exists and to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report shall be in writing and shall be filed. It shall state the facts deemed to be essential, but need not make findings of fact. No exceptions need be filed to the report. The person so designated must be an attorney at law and shall have all the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. A copy of the report shall be sent to the attorney for each party who appeared at the hearing together with a notice that the report shall be deemed confirmed as of course unless within ten days from the date of mailing the report any party shall file with the court, a notice of motion to modify or overrule the report. Upon motion of any party or upon its own initiative the court may confirm, modify or reject the report in whole or in part, may make new findings with or without taking additional testimony or may order

a new hearing.

(b) It shall not be necessary to file a transcript of the testimony with such report but on a motion to modify or overrule the report any party may file a copy of the transcript.

(c) (Added, L 1993) Upon the consent of the attorneys for all parties who have appeared at the hearing, the necessity of the preparation of the report by the person so designated may be waived and the matter decided by the court based upon the transcript of the hearing. In such event the expense of the transcript shall be a charge against the estate, or where appropriate, as otherwise directed by the court.

(d) The person so designated as referee shall not receive any compensation from the estate or from any party for his services and shall be reimbursed for his necessary expenses only as provided in 2609 (3) (a).

HISTORY: Add L 1966, ch 953, eff Sept 1, 1967.

Sub 4, amd, L 1968, ch 259, @ 7, eff May 14, 1968.

Sub 6, add, L 1971, ch 361, eff Sept 1, 1971.

Sub 6, par (a), formerly sub 6, first undesignated par, so designated and amd, L 1993, ch 514, @ 9, eff Jan 1, 1994.

The 1993 act deleted at fig 1 "law assistant"

Sub 6, par (b), formerly sub 6, second undesignated par, so designated, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, par (c), add, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, par (d), formerly sub 6, third undesignated par, so designated, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, first undesignated par, redesignated sub 6, par (a), L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, second undesignated par, redesignated sub 6, par (b), L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, third undesignated par, amd, L 1985, ch 8, @ 1, eff March 19, 1985; redesignated sub 6, par (d), L 1993, ch 514, @ 9, eff Jan 1, 1994.

NOTES:

[1971] This act was recommended by the Surrogates' Association of the State of New York. Its purpose was to authorize the court, with the express consent of all attorneys for parties appearing at the hearing, to appoint a member of its staff who is an attorney at law, as a referee to hear and report in any proceeding other than one in which the right to a jury exists. The appointee performs this service at no expense to the estate or to the parties. The purpose of the act was to attempt to hold down the costs to estates, by eliminating the need to appoint and compensate persons who are outside the judicial system. Such reference could not be made without the consent of all attorneys who appeared at the hearing. The new procedure overcomes the criticism of section 2609, subdivision 3(a), in that it provides for all counsel to be furnished with a copy of the report and an opportunity to move with respect to it. The procedure under 2609 provides only for a report to the court which need not be furnished to counsel.

Earlier statutes: SCA @@ 66, 74; CCP @@ 2536; 2546.

REVISERS' NOTES:

The section changes Surr Ct Act @ 66 insofar as a referee is not required to report the facts found or the conclusions of law and it further denies any party the right to request the making of such a finding or conclusion. The section has been conformed to CPLR 4320(b) to require the referee to set forth his findings of fact and conclusions of law. The last two sentences of Surr Ct Act @ 74 are embraced within subdivision 1.

Surr Ct Act @ 66. Special provision has been made for appointment of a referee where the amounts are less than the statutory amounts, provided the referee serves without compensation. This accords with present practice.

The third subdivision of the proposed section follows CPLR 4320(a) and (b).

No provision for the appointment of official referees to determine any and all questions of law and the fact arising or specific issues in any proceeding other than one instituted for probate of a will, as found in the second paragraph of present Surr Ct Act @ 66, has been made, since such practice no longer exists.

No reference may be had in probate proceedings or where there is a right to jury trial which has been demanded.

The third paragraph of present Surr Ct Act @ 66 appears superfluous. The fourth subdivision is modeled after CPLR 4403: the time to move has been extended to sixty days and the wording is in keeping with Surrogate's Court practice.

WHERE ISSUES WERE FIRST RAISED AND PRESERVED

The issues to be reviewed and the list of where the issues are preserved for review are:

a) Violation of petitioner's due process rights because petitioner was entitled to a hearing by a duly constituted judge of a court. A hearing conducted by a referee to hear and report instead of by a duly constituted judge of the court violated petitioner's due process rights because, *inter alia,* the determination was made by the judge who had not had an opportunity to weigh the credibility of the witnesses.

The issue is preserved for review at pages 61 to 69 of petitioner's brief to the First Department, pages 29 to 31 of her reply brief, as well as at A-4936[2] *et seq.* and A-5062 *et seq.* and A-4781, 4785, and in petitioner's submission to the Court of Appeals.

Petitioner objected both prior to and during her accounting hearing. See, e.g., A-3424 to 3429 and TR:5/17/94 p. 50 at A-573. Once the clandestine payment and 11 *ex parte* phone calls became known petitioner promptly made a motion. Moreover, until the entry of the 1998 decree there was no final order to appeal. Nor could petitioner refuse to participate in the hearing because of the risk of a default. See also Memorandum of Law

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[2] References to the Appendix submitted to the New York appellate courts are denoted as A- and contain the cites to the trial court record.

(not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19.

b) The unconstitutionality of SCPA §506 which was used to impose a privately paid attorney as a referee to conduct the hearing, without consent of the parties. Not only are the parties denied their property by the imposition of the referee fees, but they are denied access to a duly appointed judge. A referee appointed pursuant to SCPA §506 has far broader responsibilities than one appointed under CPLR §3104. SCPA §506 is also inconsistent with *Ploski v. Riverwoods Owners_Corp.*, 255 A.D.2d 24 (2d Dept. 1999) and CPLR §3104.

The issue is preserved for review at pp. 61 *et seq.* of Petitioner's Brief to the First Department, pp. 30-31 of her Reply Brief, as well as A-4936 *et seq.* and A-5062 *et seq.* as well as in Petitioner's submission to the Court of Appeals.

c) Violation of petitioner's due process rights related to defects in the referee's service because *inter alia* the reference was made *sua sponte* and was objected to by petitioner; the referee was paid by petitioner's adversary prior to the issuance of the report; there were at least 11 *ex parte* conferences with opposing counsel; an undisclosed out-of-court relationship with a party; failure to swear an oath, failure to comply with CPLR §4315, 4312(3), 4321(1); and lack of expertise in the field. *Cf. Ploski v. Riverwoods Owners Corp.*, 255 A.D.2d 24 (2d Dept. 1999);

The issue is preserved for review at pp. 61 to 69 of petitioner's brief to the First Department, pp. 29-31 of her reply

brief, as well as A-4936 *et seq.* and A-5062 *et seq* and A-4781, 4785. See also Memorandum of Law to trial court (not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19. See also petitioner's submission to the Court of Appeals.

d) Violation of petitioner's due process rights related to material misrepresentations made by the referee which denied petitioner a fair hearing. Material misrepresentations of the referee that denied petitioner due process and a fair hearing, include *inter alia:*

1) on June 15, 1994 the Referee made a ruling that "Ms. Lefkowitz has presented adequate evidence with regard to the valuations of Floral Masquerade and NVM Capital as of January 31, 1990 to shift the burden to the Bank ...." (TR: 6/15/94 p. 216 at A-1151). This ruling disrupted Petitioner from calling witnesses and the organization of her case. Nor was she later permitted to introduce more valuation evidence.

2) Assuring Petitioner at a pre-hearing conference that she could have a live court reporter transcribe the hearing at her expense (TR: 5/13 p. 8 at A-550). Early in the hearing the Referee ruled there could be no transcription by the live reporter, even if each page were stamped

"not official copy" and would not be used in court without permission (TR: 5/17 p. 34 at A-569). (See p. 65 of June 1999 brief.)

3) That Petitioner should not contest the Greene testimony of benefit to the company until later (A-508). This opportunity was never given. Yet part of the $176,000 allocated for Greene & Zinner fees related to the company.

4) That only Greene & Zinner and Shea & Gould fees related to the 1990 removal trial would be considered (TR: 5/12/94 pp. 24 *et seq.* at A-477 to A-480). Yet the amounts allocated to them far exceeded the amounts they claimed for the 1990 removal trial. The amount sought for the 1990 removal trial for Greene & Zinner was $50,000 (A-166) and for Shea & Gould was $47,000 (A-167).

5) The Referee never permitted Petitioner to value Joseph Markovits, Inc. ("JMI") as of January 31, 1990. (TR: 5/25/94 pp. 240-44 at A-703-04 and A-4742.) This information was essential to the issue of JMI's ability to repay its loans from the estate companies.

The issue is preserved for review at pp. 61 to 69 of Petitioner's Brief to the First Department, pp. 29-31 of her Reply

Brief, as well as A-4936 *et seq.* and A-5062 *et seq* and A-4781, 4785. See also Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19. It is also addressed in petitioner's submission to the Court of Appeals.

e) Violation of petitioner's due process rights in the award of $250,000 (plus interest) from petitioner's share of the estate for other beneficiaries' attorney fees because petitioner was not given notice or a hearing. In particular the 1994 hearing and the attorney fee petitions of Greene & Zinner and Shea & Gould had sought payment from the estate. In fact the February 1998 decision was contrary to the referee's factual findings and relied solely on motions to reconsider. Moreover, the decision conflicts with this court's decisions in *Matter of Dillon,* 28 N.Y.2d 597 (1971) and *Northam v. Dutchess Cty. Mut. Ins. Co.,* 177 N.Y. 73 (1903), and the Third Department's decision in *Matter of Urbach,* 252 A.D.2d 318 (3d Dept. 1999) and the Fourth Department's decision in *Estate of Bellinger,* 56 A.D.2d 448, 451 (4th Dept. 1977), as well as numerous other decisions;

The issue is preserved for review at pp. 14 to 18 of petitioner's brief to the First Department and p. 34 of the reply brief, and at A-2857 to 3458 and A-3474 to 3501. Because the 1998 decision was in response to motions to reconsider (which did not disclose petitioner's exposure even in the notices of motion, at A-3462-63 and A-2816-17), decided almost 4 years after the 1994 hearing, the due process issues could not have been argued at the hearing or before petitioner knew Greene & Zinner and Shea & Gould sought to change the relief sought and that her property was at risk. Nevertheless, her "due process" arguments

below are found at A-3475 and A-3477. See also Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 163 to 197. The issue is also addressed in petitioner's submission to the Court of Appeals.

It is unconstitutional for a court to rule in a matter over which it lacks subject matter jurisdiction. Subject matter jurisdiction goes to the court's power. The issue of subject matter jurisdiction may not be waived or "conferred" by consent. Moreover, it can be raised at any time.

Moreover, in ¶47 of her August 31, 1996 affidavit at A-4800, Petitioner stated she "preserves all issues for appeal including but not limited to the denial of her constitutional right to a fair hearing and to due process and equal protection of the law ..."

LIST OF DOCUMENTS SUBMITTED TO
NEW YORK COURT OF APPEALS

Copies of the following were filed with the New York Court of Appeals in October 2000:

October 27, 2000 Statement of Subject Matter Jurisdiction for Appeal as of Right to the Court of Appeals on Basis of Constitutional Question;

October 16, 2000 Jurisdictional Statement Pursuant to Rule 500.2 for Appeal as of Right to the Court of Appeals;

October 16, 2000 Notice to Attorney General and certification of service;

October 6, 2000 Notice of Appeal;

October 26, 1999 order of the Appellate Division, First Department with notice of entry served on November 4, 1999;

February 8, 2000 order of the Appellate Division, First Department with notice of entry served on March 16, 2000;

July 15, 1999 order of the Appellate Division, First Department with notice of entry served on August 20, 1999;

June 13, 2000 order of the Court of Appeals with notice of entry served on September 5,

2000;

The decree dated April 23, 1998 with entry on April 27, 1998;

The February 6, 1998 decision of the Surrogate's Court,

The July 29, 1997 decision of the Surrogate's Court,

May 16, 1997 decision of the Surrogate's Court also within Exhibit E of April 11, 2000 motion;

February 1, 1994 order appointing the Referee;

The Referee's Report dated December 1, 1995.

Copies of the following were previously filed with the New York Court of Appeals on April 11, 2000:

Motion for leave to appeal;

Appellant's Brief to the First Department;

Appellant's Reply to the First Department;

Appellant's 5,172 page Appendix to the First Department;

3 Respondents' Briefs to the First Department;

Notice of Appeal served on May 26, 1998;

April 1, 1999 order of First Department granting Appellant's motion to enlarge the time to perfect the appeal within Exhibit D of April 11, 2000 motion;

March 16, 1999 order of Surrogate's Court settling the transcript within Exhibit E of April 11, 2000 motion.